International mixed marriage in Indonesia and ASEAN

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International Mixed Marriage and its recognition in Indonesia towards One ASEAN Community

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Introduction

1 Background Issue

The Association of Southeast Asian Nations or better known as "ASEAN" is an intergovernmental regional organization established in 1967. Now comprising ten member states (hereinafter referred to as the "ASEAN Member States"),[1] this organization was initially formed for political and security reasons.

In 1997, the ASEAN Member States in Kuala Lumpur committed to reaching the ASEAN Vision 2020 that led them to engage in closer cooperation known as the ASEAN Community, as drafted at a conference in Bali in 2003. In 2007, the ASEAN Member States declared that the ASEAN Vision 2020 is to be further accelerated by the establishment of the ASEAN Community by 2015.[2] This declaration is called the Cebu Declaration.

The ASEAN Community is based on so-called three pillars to attain and achieve the ASEAN Vision 2020.[3] These three pillars are the ASEAN Economic Community (AEC), the ASEAN Security Community (ASC) and the ASEAN Socio-Cultural Community (ASCC). The latest works for implementing the ASEAN Community were described in the ASEAN Community Vision 2025 as concluded in Kuala Lumpur in 2015.[4] The latest declaration contains more details on the ASEAN Community Vision 2025, comprising the ASEAN Political-Security Community Blueprint 2025, the

[1] ASEAN is an intergovernmental organization which was established on August 8, 1967 in Bangkok based on the Bangkok Declaration by five founding member states namely Indonesia, Malaysia, Singapore, the Philippines and Thailand. After its establishment, Brunei Darussalam joined on January 8, 1984, followed by Vietnam on July 28, 1995, Lao PDR and Myanmar on July 23, 1997 and lastly Cambodia on April 30, 1999. At present, the above are known as the ten Member States of ASEAN. Official ASEAN webpage available at http://www.asean.org/asean/about-asean/overview, last accessed on December 20, 2016.

[2] See "Cebu Declaration 2007" at http://asean.org/cebu-declaration-on-th-acceleration-of-the-establishment-of-an-asean-community-by-2015/ last accessed on July 14, 2016.

[3] See "Declaration of ASEAN Concord II (Bali Concord II) 2003", available at http://asean.org/?static_post=declaration-of-asean-concord-ii-bali-concord-ii-2, last accessed on July 14, 2016.

[4] See "ASEAN Vision 2025: Forgoing Ahead Together" at http://www.asean.org/storage/2015/12/ASEAN-2025-Forging-Ahead-Together-final.pdf, last accessed on July 14, 2016.

ASEAN Economic Community Blueprint 2025 and the ASEAN Socio-Cultural Community Blueprint 2015.[5]

The ASEAN Political-Security Community or ASC aims to become a united, inclusive and resilient community by 2025. The ASEAN Member States would like to have their nationals live in a safe, harmonious and secure environment, embrace the values of tolerance and moderation as well as uphold ASEAN fundamental principles, shared values and norms. ASEAN seeks to remain cohesive, responsive and relevant in addressing the challenges to regional peace and security as well as in playing a central role in shaping the evolving regional architecture while deepening its engagement with external parties and contributing collectively to global peace, security and stability.[6]

On the other hand, the ASEAN Economic Community aims to become highly integrated and cohesive, competitive, innovative and dynamic by 2025 with enhanced connectivity and sectorial cooperation as well as a more resilient, inclusive, people-oriented and people-centered community which is integrated with the global community.[7]

Lastly, the ASEAN Socio-Cultural Community by 2025 aims to become a community that engages and benefits its people as well as is inclusive, sustainable, resilient and dynamic.[8] In its second point, ASEAN undertakes to realize an inclusive community that promotes a high quality of life, provides equitable access to opportunities for all and promotes as well as protects the human rights of, among others, women, children, the youth, the elderly and persons with disabilities.[9]

The above cooperation of the ASEAN Member States and its vision as the ASEAN Community has consequently led to the meeting of various legal systems. The unification and or harmonization between such systems in preparing for the cooperation is therefore essential. In light of this, this research would like to address a particular field of law, namely marriage establishment under the family law. Besides being necessary to preparing for the ASEAN motto One Vision, One Identity, One Community, this field is also important because as one open community, it would be necessary for ASEAN to facilitate the possibility of marriages taking place between the nationals of the ASEAN Member States.

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[5] *Ibid*.

[6] ASEAN, *Kuala Lumpur Declaration on ASEAN 2025: Forging Ahead Together*, (Jakarta: ASEAN Secretariat, 2015), p. 14.

[7] *Ibid.,* p. 15.

[8] *Ibid.,* p. 16.

[9] *Ibid.*

The commitment of marriage between two individuals who have two different nationalities or which involves two or even more legal systems results in a contact or connection between different legal systems. This contact or connection arises from a situation whereby the bride and the groom do not have the same nationality, or are not living in the same state, or do not have the nationality of the country in which they live. These situations make their marriage different from a domestic marriage.

The term domestic marriage, on the other hand, refers to a marriage between two people of the same nationality, with the place of marriage solemnization also being the country of their nationality. In a domestic marriage, one legal system is applied without any option to choose any other laws.

In a marriage that involves a contact between two or more legal systems, it is expected that such marriage is considered valid and legal according to each of the relevant legal systems. A valid and legal marriage will result in legal protection for the couple and both the husband and wife alike. Another reason as to why this is important is to provide valid protection for the innocent children born from such a marriage.

If the marriage of two parents is valid, then the process of obtaining any required stay permit, passport or any identification of nationality of their children will not be complicated. The relevant family or at least their children will not be concerned about any chance of deportation because of incorrect permits or stay permits within the country of the parents.

As a result of contact between differing legal systems in a marriage between different nationalities, Private International Law or hereinafter referred to as "**PIL**" is of considerable importance. First of all, PIL decides on which law is to be applied as the prevailing law to determine the capacities of each of the husband and wife, or both. Secondly, PIL will decide on which law is to be applied to solemnize the marriage or the authorized forum for the marriage, including for the purpose of marriage registration whenever necessary or as may be required by the applicable laws. Thirdly, PIL will deal with the issue of acknowledgment or recognition of a marriage. If a marriage is unfortunately dissolved at a court, then the question will naturally be the grounds of such divorce and its consequences instead of annulment of the marriage.

These three issues are dealt with through PIL.[10] However, each country of the world including each of the ASEAN Member States has its own legal system of PIL which may differ as to the extent of its involvement.

[10] In PIL, three things matter. First of all, which state court is authorized to rule on a case which has a foreign point of contact? Secondly, what law is applicable to the case. Thirdly, with regard to the recognition

Within ASEAN, courts of the ASEAN Member States are or will be facing more and more international family law cases. The free movement of persons as agreed by the ASEAN Member States will result in the high mobility of individuals within ASEAN, while social media in cyberspace or the Internet has made transborder communications much easier and resulted in increasing contacts and or relations between individuals within ASEAN. The aforementioned mobility within the ASEAN region has in turn led to a major rise in the formation and or dissolution of international families. With these facts in mind, the number of cross-border family relationships is predicted and expected to increase.

PIL is the instrument needed to bridge existing differences in the substantive laws of the ASEAN Member States. PIL is expected to contribute to the harmonization and/or (if possible) the unification of such differences. Diversity of the various national laws requires a system of coordination between the ASEAN Member States which is compatible with the culture and tradition of ASEAN.

At this moment, a progressive cooperation incites the establishment of a common PIL amongst the ASEAN Member States. It entails a system of coordination of laws not only on services and trade as well as capital, but also on international family law within ASEAN.

According to its prime principle, PIL respects all of the legal systems adopted by nations. PIL also respects any existing diversities between the ASEAN Member States and aims to solve any possible conflicts between them. This principle is reflected in the cooperation principles amongst the ASEAN Member States from the initial establishment of ASEAN, i.e. that any state will not interfere with and will respect the authorities of other states.

The unification of ASEAN's international family law will go beyond what the ASEAN Member States would be able to accomplish, as there is not one sufficient uniform substantive law in existence. In addition, some opinions state that family law is unsuitable for international unification, as it is based on social and cultural norms and values which are excessively varied and sensitive. The deeply rooted nature of family law within each of the ASEAN Member State serves in itself as a primary difficulty for ASEAN to harmonize or unify the same.

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and enforcement of foreign awards: under what circumstances can a foreign judgment rendered by a court of another state be recognized and enforced? See Mathijs W. Ten Wolde and Kirsten Heckel, *European Private International Law: A Comparative Perspective on Contracts, Torts and Corporations.* (Groningen: Ulrik Huber Institute for Private International Law, 2012), pp. 2-5. In the Indonesian context, please see Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia* (translation: Introduction to Indonesian Private International Law), (Bandung: Binacipta, 1987), pp. 9-10.

Despite growing support for cooperation amongst the ASEAN Member States, the harmonization and/or unification of international family law are still hardly feasible since (i) differences in substantive family law cannot be denied, and (ii) there is no legal basis for such harmonization and/or unification. Such will therefore be a great challenge for ASEAN. However, efforts to undertake such attempt cannot be delayed, whereby one should start and try to make an approach.

Family law in Indonesia, particularly with regard to marriage, is regulated in the Marriage Act enacted in 1974 which is hereinafter referred to as "**MA 1974**". Changing substantive marriage rules in Indonesia,[11] MA 1974 applies to all Indonesian nationals when previously several rules had applied according to the class, religion or ethnic group of the relevant couple.[12]

MA 1974 acknowledges two types of mixed marriages, i.e. inter-religion mixed marriage and international mixed marriage as defined in Art. 2 *jo*. Art. 57 of MA 1974.[13] An inter-religion mixed marriage is a marriage concluded between a husband and wife who are subject to different legal systems due to their different religions or faiths.[14] An

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[11] Law No. 1 of 1974 regarding Marriage dated January 2, 1974, State Gazette No. 1 of 1974, Supplement to the State Gazette No. 3019. MA 1974 was effectively applied on October 1, 1975 after the issuance of Implementing Regulation No. 9 of 1975 dated April 1, 1975, State Gazette No. 12 of 1975, Supplement to the State Gazette No. 3050.

[12] See the Consideration of MA 1974; also see Ny. Maria Ullfah Subadio, *Perjuangan untuk Mencapai Undang-undang Perkawinan*, (Jakarta: Yayasan Idayu, 1981), p. 18. Before MA 1974 was effectively applied, several marriage laws had been applied to the so-called "population groups" in Indonesia (*bevolkingsgroupen*): (1) Indonesians who were Moslems had been subjected to Islamic law, as absorbed (*receptie*) by customs or *adat* law; (2) native Indonesians had been subjected to *adat* law; (3) Indonesians who were Christians had been subjected to *Huwelijkesordonantie Christen Indonesie (HOCI S.1933 No. 74);* (4) Eurasians and Oriental Chinese and Indonesian Chinese were subjected to the Civil Code and its amendments; (5) other foreigners had been subjected to their respective customs law; and (6) Europeans and nationals of nations equated to Europa had been subjected to the *Burgerlijk Wetboek*. This population group is stipulated in Art. 131 of *Indische Staatsregeling*, State Gazette No. 415 of 1925 (hereinafter "IS") *jo*. Art. 163 of IS; see Sudargo Gautama (1996), pp. 279-280, also Zulfa Djoko Basuki (2010), pp. 3-4, also Wirjono Prodjodikoro (1991), pp. 14-15.

[13] Art. 2 (1) of MA 1974. "*Perkawinan adalah sah apabila dilakukan menurut hukum masing-masing agamanya dan kepercayaannya itu.*" Translation: "A marriage is validly concluded if it is conducted pursuant to the law of the religion and faith of the couple." Art. 57 of MA 1974. *"Yang dimaksud dengan perkawinan campuran dalam undang-undang ini adalah perkawinan antara dua orang yang di Indonesia tunduk pada hukum yang berlainan karena perbedaan kewarganegaraan, dan salah satu pihak berkewarganegaraan Indonesia."* Translation: "A mixed marriage in this law shall be a marriage between two persons in Indonesia who are subject to differing national laws due to differences in their nationalities, one of whom is an Indonesian national."

[14] H. Ichtijanto, *Perkawinan Campuran Dalam Negara Republik Indonesia, Suatu Studi ke Arah Hukum yang Dicita-Citakan* (translation: Mixed Marriage within the Republic of Indonesia, A Research Study to a Desired Law), Dissertation, (University of Indonesia, Jakarta: 1993), pp. 88-89, and *Perkawinan Campuran dalam Negara Republik Indonesia* (translation: Mixed-Marriage in the Republic of Indonesia). Jakarta, Badan Litbang Agama dan Diklat Keagamaan, Departemen Agama Republik Indonesia, 2003. See also opinions about interfaith marriage in MA 1974 as written by Octavianus S. Eoh, *Perkawinan Antar-Agama Dalam Teori dan Praktik* (translation: Inter-faith Mixed Marriage in Theory and Practice), (Jakarta: PT. RajaGrafindo Persada, 1996), pp.

international mixed-marriage, on the other hand, is a marriage between an Indonesian national and a foreigner within Indonesia. In the latter, the husband and wife are subject to different legal systems due to their different nationalities.[15]

In relation to international mixed marriage, MA 1974 stipulates that requirements of the capacity of the husband and wife are subject to the law of their respective nationalities,[16] while marriage solemnization will follow the law where the marriage is solemnized. If the marriage is solemnized abroad, such must be followed by registration at the local Civil Registration Office within a year after the couple's return.[17]

In this regard, the Civil Administration Law[18] requires a couple who have had their marriage solemnized abroad to undertake several proceedings. The couple must first register their marriage at a local authorized registration office, after which a report or notification must be made to an Indonesian representative in the respective country. In the event there is no such office, the marriage registration must be done in an Indonesian representative office, upon which a Marriage Certificate will be issued.

35-37; Djaja S. Meliala. *Perkembangan Hukum Perdata Tentang Orang dan Hukum Keluarga* (translation: Development of Civil Law on Person and Family Law), 2nd revised Ed., (Bandung: Nuansa Aulia, 2006), pp. 129-131; Ratno Lukito, *Trapped Between Legal Unification and Pluralism, The Indonesian Supreme Court's Decision on Interfaith Marriage* in Gavin W. Jones, Chee Heng Leng, Maznah Mohamad (Ed.), *Muslim-Non-Muslim Marriage, Political Contestations in Southeast Asia* (Singapore: ISEAS-Yusof Ishak Institute, 2009), pp. 33-58; Sri Wahyuni, *Nikah Beda Agama Kenapa ke Luar Negeri?* (translation: Why Conduct Inter-Faith Mixed Marriage Abroad?), (Yogyakarta: Alfabet, 2016), pp. 26-38.

[15] Art. 57 of MA 1974. *"…karena perbedaan kewarganegaraan, dan salah satu pihak berkewarganegaraan Indonesia."* Translation: "… due to differences in their nationalities, one of whom is an Indonesian national."

[16] Art. 60 (1) of MA 1974. "*Perkawinan campuran tidak dapat dilangsungkan sebelum terbukti bahwa syarat-syarat perkawinan yang ditentukan oleh hukum yang berlaku bagi pihak masing-masing telah dipenuhi.*" (translation: "A mixed marriage may not be held before it is proven that all requirements for marriage determined by applicable laws for each party have been met."

[17] Art. 56 of MA 1974. "(1) *Perkawinan yang dilangsungkan di luar Indonesia antara dua orang warga Negara Indonesia atau seorang warga Negara Indonesia dengan warga Negara Asing adalah sah bilamana dilakukan menurut hukum yang berlaku di Negara di mana perkawinan itu dilangsungkan dan bagi warga Negara Indonesia tidak melanggar ketentuan-ketentuan Undang-undang ini. (2) Dalam waktu satu tahun setelah suami istri itu kembali di wilayah Indonesia, surat bukti perkawinan mereka harus didaftarkan di Kantor Pencatatan Perkawinan tempat tinggal mereka.*" Translation: "(1) A marriage which is held outside Indonesian territory between two Indonesian Nationals or an Indonesian National and a foreign National shall be valid if it is conducted according to the laws applicable in the Country in which the marriage is held and for the Indonesian national, it does not violate the provisions of this Law. (2) Within one year after the husband and wife return to Indonesian territory, their marriage certificate must be registered with the Marriage Registry Office of their domicile."

[18] Indonesia, Law No. 23 of 2006 regarding Civil Administration, State Gazette No. 124 of 2006, as amended with Law No. 24 of 2013 regarding Amendment to Law No. 23 of 2006 regarding Civil Administration, State Gazette No. 232 of 2013.

If the couple return to Indonesia, then they must report on their marriage to the Indonesian Representative Office within 30 days as of their arrival.[19] The Civil Registration Office claims that those stipulations relate only to the civil registration of marriage and do not deal with its validity. The validity of a marriage refers to Art. 56(1) of MA 1974, which clearly mentions that a marriage is valid only if it is solemnized according to the local laws, provided that such solemnization does not contradict with the provisions of MA 1974.[20]

While the above stipulations seem to cover the establishment of an international mixed marriage, it is still an open discussion as to whether or not they are in harmony with the international family law legislation of the ASEAN Member States.

Nowadays, the Academic Bill on Indonesian PIL is currently under discussion. Its first draft was issued in 2014[21] and revised the following year. Notwithstanding the fact that this Academic Bill is not yet effective, it may well serve as a restatement and the common opinion of PIL scholars (*communis opinio doctorum)* on Indonesian PIL.[22] It is therefore worth discussing and analyzing, even more so while it is under discussion amongst the PIL scholars in Indonesia.

These discussions could hopefully offer some stipulations to the Bill in relation to the establishment of international mixed marriages and the harmonization of international family law legislation within the ASEAN Member States.

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[19] Art. 37 of Civil Administration Law. *"(1) Perkawinan Warga Negara Indonesia di luar wilayah Negara Kesatuan Republik Indonesia wajib dicatat pada Instansi yang berwenang di negara setempat dan dilaporkan pada Perwakilan Republik Indonesia. (2) Apabila negara setempat sebagaimana dimaksud pada ayat (1) tidak menyelenggarakan pencatatan perkawinan bagi orang asing, pencatatan dilakukan pada Perwakilan Republik Indonesia setempat. (3) Perwakilan Republik Indonesia sebagaimana dimaksud pada ayat (2) mencatat peristiwa perkawinan dalam Register Akta Perkawinan dan menerbitkan Kutipan Akta Perkawinan. (4) Pencatatan perkawinan sebagaimana dimaksud pada ayat (1) dan ayat (2) dilaporkan oleh yang bersangkutan kepada Instansi Pelaksana di Indonesia di tempat tinggalnya paling lambat 30 hari sejak yang bersangkutan kembali ke Indonesia."*

[20] It is also an interesting topic to discuss. The validity of a marriage and its registration will therefore be further discussed in Chapter 3 regarding Mixed Marriage.

[21] This Academic Bill is discussed in and corresponds to an article of the author in the journal of *Nederlands Internationaal Privaatrecht*: T.M.P. Allagan, *The Bill on Indonesian Private International law,* NIPR Vol.33/3, 2015, pp. 390-403.

[22] Paragraph 1 of the Explanatory Memorandum of Bill 1997. See also Badan Pembinaan Hukum Nasional, *Naskah Akademik RUU tentang Hukum Perdata Internasional (Lanjutan)* (translation: the Academic Bill of Indonesian Private International Law (Revision), (Jakarta: Kementerian Hukum dan Hak Asasi Manusia, 2015).

2 Thesis and demarcation of research

Family law is an area that is regulated by the national laws of a country. This research therefore seeks to examine the nature of marriage within the national laws of the ASEAN Member States. Bearing in mind that this research serves as an early stage of the ASEAN framework, it will start with a comparison of marriage law. However, as a comparison of all of substantive laws would be impossible, the author has focused her research on the topic of marriage formation or establishment.

In order to obtain the essence of marriage between the national laws of the ASEAN Member States, a comparison of the national laws would relate to the establishment of marriage, particularly the substantive requirements and the solemnization of such marriage.

The aim of this comparison is to untangle and analyze the differences and similarities in the establishment of marriage as stipulated by the national laws of the ASEAN Member States. As far as differences are concerned, further analysis will touch upon whether such differences could be justified and bridged by Private International Law rules, hereinafter referred to as "**PIL**". In relation to similarities, the analysis will be on whether this could serve as a basis for recognition or acknowledgment of the marriage. The subsequent aim would therefore be to determine the existence and extent of the establishment of a supranational ASEAN system of international family law as well as the choice of methodology of law underlying the national system of international law.

In relation to Indonesia, the aim of this research is to ascertain what Indonesia can learn from other ASEAN Member States upon a comparison of their substantive requirements and solemnizations of marriage being made, particularly on their PIL rules and inter-rules of law, if any. This is necessary in order to facilitate the marriages of Indonesian nationals which are solemnized abroad and mixed marriages in Indonesia. The marriage regulations in Indonesia, namely MA 1974 and the Academic Bill of Indonesian PIL, have become major highlights. The Bill of Indonesian PIL is of particular highlight due to its current discussions.

3 Terminology

The provisions on marriage constitute a field of substantive laws which are very diverse in nature. For instance, Siehr collected the definitions of marriage and found that there

are nine types of marriage or similar institutions.[23] Therefore, it is essential to provide an operational definition which would serve as the boundaries of discussion in this research.

The term "marriage" in this research refers to a family union in the form of relation between a husband and wife as two persons of the opposite sex, which serves as a contract or sacrament on the one hand and status on the other hand.[24] A marriage creates legal kinship amongst them and the children involved.

Marriage involves co-habitation between the husband and wife, yet it is more than just a partnership or civil relations between them. This particular union between a husband and a wife refers to a legal method through which a spouse changes their legal civil status from single to married. Any registered partnership or any institution that is similar to marriage will therefore not be included in this discussion.[25]

A mixed marriage will be a marriage between a husband and wife who are subject to different legal systems due to (among others) place of marriage, nationality or religion, as confessed by each of the husband and wife.[26]

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[23] Kurt Siehr (2003). *Family Unions in Private International Law,* Netherland International Law Review, 50, pp. 419-435. (1) Traditional marriage of opposite-sex; (2) "covenant marriage" according to the law of some States of the United States; (3) same-sex marriages such as those introduced in the Netherlands and Belgium; (4) registered partnership of same-sex partners such as those introduced in the Scandinavian countries and in Germany; (5) registered partnership of opposite-sex partners as introduced by the French PACS; (6) contractual partnerships of same-sex partners as introduced by the French PACS; (7) contractual partnership of opposite-sex partners as introduced by the French PACS; (8) factual partnerships of opposite-sex such as those recognized in Slovenia and Croatia, as well as in South America as "unions de hecho"; (9) factual partnership of same-sex partners such as those recognized in France as "*concubinage*" or in the United States.

[24] Dagmar Coester-Waltjen, *Marriage* in *Encyclopedia of Private International Law*, (ed.) Jürgen Basedow, Giesel Rühl, Franco Ferrari, Pedro De Miguel Asensio, (Cheltenham: Edward Elgar Publishing Limited, 2017), pp. 1226-1234.

[25] For comparison, see Leenard Palsson. *Marriage and Divorce in Comparative Conflict of Laws* (Leiden: A.W. Sijthoff, 1974), pp. 144-150. See also Nynke A. Baarsma, *The Europeanisation of International Family Law, From Dutch European Law: An Analysis on the Basis of the Choice of Law on Divorce and on the Termination of Registered Partnerships.* Dissertation, (Groningen: Ulrik Huber Institute for Private International Law, 2010), pp. 6-7.

[26] Sudargo Gautama, *Segi-Segi Hukum Peraturan Perkawinan Campuran (Staatblad 1898 No. 158)* (translation: Legal Aspects of Mixed Marriage Regulation (State Gazette 1898 No. 158), 4th Ed., revised Ed., (Bandung: Penerbit PT Citra Aditya Bakti, 1996), pp. 2-3.

PIL or Private International Law forms part of national private law. In principle, it is therefore a national law which stipulates the applicable law and the forum for jurisdiction as well as the recognition of cases that involve foreign element(s).[27]

4 Research methodology

In order to ascertain the essence of marriage between the national laws of the ASEAN Member States, a comparison has been made in this research between their prevailing national laws with regard to marriage. Research has been conducted by way of library research which started from the prevailing regulations on marriage establishment as enacted by the ASEAN Member States. Court decisions and scholar opinions have also been cited whenever necessary, namely to confirm any arising ambiguity on particular matters.

5 Outline

This research consists of eight chapters that hereafter can be divided into three major parts. The first part consists of chapters 2 and 3, which contain an overview and discussion on Indonesian laws and regulations on marriage. The second part consists of chapters 4, 5 and 6. These chapters discuss ASEAN as the regional organization in Southeast Asia which consists of ten member states and the marriage law according to each of their respective national laws, including on mixed-marriage. The last part consists of chapters 7 and 8 as the concluding chapters of this research.

Chapter 2 explains on the Indonesian marriage law as provided in MA 1974, particularly on the substantial requirements of marriage and its solemnization. It will give a general overview on how Indonesia has regulated the issue of marriage and its legal consequences.

Chapter 3 describes mixed marriage based on MA 1974, which defines the same as a marriage between a husband and wife who are subject to differing national laws due to differences in their nationalities, one of whom is an Indonesian national. The discussion will cover the determination of the applicable law to decide on the capacity to marry off each of the husband and wife and the valid solemnization of marriage for the couple.

In addition, this chapter will also cover inter-faith mixed marriage, which has recently become a trending topic since several law students have requested for constitutional

[27] Mathijs H. ten Wolde and K.C. Heckel, Loc*. Cit.,* pp. 4-5. In the Indonesian context, see Sudargo Gatuama, *Pengantar Hukum Perdata Internasional Indonesia* (translation: Introduction to Indonesian Private International Law). (Bandung: Binacipta, 1987), pp. 1-7.

adjudication on the same. This discussion will be followed by landmark decisions whenever necessary to confirm any ambiguity. Lastly, this chapter will also discuss the Bill of Indonesian PIL, with the choice of law and the authorized state forum becoming the main points of focus.

Chapter 4 discusses ASEAN as the regional organization in Southeast Asia which consists of ten member states. This chapter explains the purposes and objectives of ASEAN which are better known as the three pillars of cooperation of ASEAN. The chapter will also discuss the characteristics of ASEAN (including its atmosphere and decision-making system) or the so-called the "ASEAN Way". This discussion seeks to answer whether the ASEAN Way could indeed help the harmonization and unification of PIL within the ASEAN Member States.

Chapter 5 elaborates on marriage regulations, particularly substantive law requirements in relation to the capacity of the couple and valid solemnization of the marriage. The elaborations will be made in an alphabetical order of the member states: Brunei Darussalam, Cambodia, Lao PDR, Malaysia, Myanmar (previously: Burma), the Philippines, Singapore, Thailand and Vietnam. Each of their laws will be compared to Indonesian law, particularly as regards the substantive requirements and the solemnization of marriage.

Chapter 6 discusses the regulations of the ASEAN Member States in relation to a marriage that contains an international or foreign aspect to it. This chapter will discuss the marriage between a couple of differing nationalities one of whom is a native and the solemnization of marriage. This chapter will also cover a marriage which is held outside the territory of the relevant state. How prevailing laws and regulations determine the applicable law is the main focus of discussion on the aforesaid type of marriage. Inter-faith mixed marriage will also be discussed, namely when there is no regulation on a marriage between a husband and wife who are a national and a foreign national as well as its solemnization.

Chapter 7 constitutes the beginning of the concluding part. It will contain the conclusions of the aforementioned discussions. This chapter will also include recommendations of the basic thoughts and spirit in preparing rules and regulations (also on the recognition of marriages) for the ASEAN One Community. This chapter includes a discussion on the Bill of Indonesian PIL, which among others contains a proposal to amend the nationality principle as well as the PIL rules in relation to mixed marriages in Indonesia.[28]

[28] See Sudargo Gautama (1987), also see Sudargo Gautama and Sri Hanifa Wiknjosastro, *Some Aspects of Indonesian Private International Law,* Malaya Law Review, 1990, pp. 418-432.

Chapter 8 consists of research conclusions on the subject matters in question as well as any necessary suggestions and/or recommendations for both the ASEAN framework and Indonesia.

Chapter 2:
Marriage Law in Indonesia

1 Introduction

This chapter will describe the prevailing marriage laws in Indonesia, particularly Law No. 1 of 1974 regarding Marriage (hereinafter referred to as "**MA 1974**") as the first Indonesian national law on marriage.[29] The general provisions of MA 1974 will be elaborated to give an understanding of Indonesian marriage laws.

This chapter will also cover the definition of marriage, the requirements for a marriage and its solemnization as well as its prevention and annulment. A Marriage according to the *Adat* Law will also be elaborated as one of the sources of marriage laws in Indonesia.

2 Law No. 1 of 1974 regarding Marriage

2.1 Background of MA 1974

MA 1974 was introduced due to the stimulation of two ideas of marriage law, namely its unification and legal reform. Unification is the idea of enforcing a single national law to all Indonesians, while the idea behind legal reform is essentially to accommodate women's emancipation which puts men and women into an equal position, both as regards rights and obligations between them and to their children.[30]

MA 1974 replaced previously scattered laws and regulations which had been applied to each "population group" (*bevolkingsgroupen*). Before the effective application of MA 1974, several marriage laws had been applied to various population groups in Indonesia, namely: (1) Moslem Indonesians, who were subject to the religion's laws as absorbed (*receptive*) by the *Adat* Law; (2) native Indonesians to the *Adat* law; (3) Christian Indonesians to *Huwelijkesordonantie Christen Indonesie (HOCI S.1933 No. 74);* (4) Oriental Chinese and Chinese Indonesians to the Civil Law and its amendments; (5) other Foreign Orientals to their custom laws; and (6) Europeans and Indonesian

[29] Law No. 1 of 1974 regarding Marriage Law as enacted on 2 January 1974, State Gazette No. 1 of 1974, Supplement No. 3019 of 1974.

[30] Rosa Agustina, *Beberapa Catatan Tentang Hukum Perkawinan di Indonesia (Notes on Marriage Law in Indonesia)* in W.D. Kolkman, Rosa Agustina, Leon C.A. Verstappen, Rafael Edy Bosko, *Personal Law, Family Law and Heritance Law in the Netherlands and Indonesia,* (Jakarta: Pustaka Larasan, 2012), p. 129.

Europeans or those equated to them to *Burgerlijk Wetboek* (hereinafter referred to as "**BW**").[31]

BW was initially applied to the European group within the *Netherlands Indischë* (now the Republic of Indonesia) as well as to others considered to be their equal pursuant to Art. 163 of IS. BW in *Netherlands Indischë* was promulgated in State Gazette of 1847 No. 23 and has been declared effective since 1 May 1848. Thereafter, BW was applied in Indonesia based on the principle of concordance as reflected in Art. 75 of *Regering Reglement* and Art. 131 of IS. These regulations stipulated that the applicable laws for the European group in the *Netherlands Indischë* were laws and regulations prevailing in their motherland, the Netherlands.

MA 1974 states, as an essential principle of marriage in Indonesia, that a marriage must be conducted according to the respective couple's religion and belief and must be registered.[32] Pursuant to this stipulation, a marriage is invalid if it is not conducted according to the respective parties' religion and belief.[33]

MA 1974 further stipulates the basic issue of marriage in Indonesia, namely that it must be based on mutual consent of the parties in order to prevent any occurrence of a forced or arranged marriage (*kawin paksa*).[34] MA 1974 also adopts a limited monogamous system whereby a man may practice polygamy under strict requirements so that a

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[31] This population group is stipulated in Art. 131 of *Indische Staatsregeling*, State Gazette No. 415 of 1925 (hereinafter "IS") jo. Art. 163 of IS. See also point 2 of the Official Elucidation of MA 1974 and Sudargo Gautama in *Segi-Segi Hukum Peraturan Perkawinan Campuran (Staatblad 1898 No. 158) (Legal Aspects of Mixed Marriage (State Gazette 1898 No. 158)*, 4th Ed., revised edition (Bandung: Citra Aditya Bakti, 1996), pp. 279-280. This book is based on his dissertation in the Faculty of Law of Universitas Indonesia as defended in early 1955. Several Indonesian scholars had also written and re-stated the same history afterwards, among others Zulfa Djoko Basuki in *Hukum Perkawinan di Indonesia (Marriage Law in Indonesia)* (Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2010) pp. 3-4 and Wirjono Prodjodikoro in *Hukum Perkawinan di Indonesia (Marriage Law in Indonesia)*, 9th Ed., (Bandung: Sumur Bandung, 1991), pp. 14-15.

[32] Art. 2 (1) of MA 1974. "*(1) Perkawinan adalah sah, apabila dilakukan menurut hukum masing-masing agamanya dan kepercayaannya itu. (2) Tiap-tiap perkawinan dicatat menurut peraturan perundang-undangan yang berlaku.*" Translation: "(1) A marriage shall be valid, in the event that it is conducted according to law of the religion and belief of the respective parties. (2) Every marriage shall be registered according to prevailing laws and regulations." See Zulfa Djoko Basuki, *Hukum Perkawinan di Indonesia, Op.Cit*., pp. 8-11. See also Wahyono Darmabrata, *Tinjauan Undang-undang No. 1 Tahun 1974 Tentang Perkawinan Beserta Undang-Undang dan Peraturan Pelaksanaannya (Review of Law No. 1 of 1974 regarding Marriage along with Its Implementing Laws and Regulations),* (Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia, 1997), pp. 4-6, 10-11.

[33] Official elucidation of Art. 2 para (1) of MA 1974. *"Dengan perumusan pada Pasal 2 ayat (1) ini, tidak ada perkawinan di luar hukum masing-masing agamanya dan kepercayaannya itu, sesuai dengan Undang-Undang Dasar 1945."* Translation: Based on the formulation in this Art. 2 para (1), there shall be no marriage beyond law of their respective religion and belief, in accordance with the 1945 Constitution.

[34] Art. 6 (1) of MA 1974. *"(1) Perkawinan harus didasarkan atas persetujuan kedua calon mempelai."* Translation: "(1) A marriage must be based on the approval of both the candidate bride and groom."

woman cannot easily become a co-wife.[35] MA 1974 also imposes the minimum age requirement for entering into a marriage, namely to ensure the maturity of the couple and prevent any occurrence of child marriage and divorce as well as to control the population.[36] Both husband and wife have an equal position in a marriage; each of them has equal rights and obligations as well as the capability to take any legal actions.[37] The

[35] Art. 4 of MA 1974. *"(1) Dalam hal seorang suami akan beristri lebih dari seorang, sebagaimana tersebut dalam Pasal 3 ayat (2) Undang-Undang ini, maka ia wajib mengajukan permohonan kepada Pengadilan di daerah tempat tinggalnya. (2) Pengadilan dimaksud dalam ayat (1) pasal ini hanya memberikan izin kepada seorang suami yang akan beristri lebih dari seorang apabila (a) istri tidak dapat menjalankan kewajibannya sebagai istri; (b) istri mendapat cacat badan dan/atau penyakit yang tidak dapat disembuhkan; (c) istri tidak dapat melahirkan keturunan."* Translation: "(1) In the event that a husband will have more than one wife as referred to in Article 3 paragraph (2) of this Law, he shall be obligated to submit an application to the court of his residential area. (2) The Court referred to in paragraph (1) of this article shall only grant permission to a husband who will have more than one wife in the event that (a) his wife is unable to perform her obligations as a wife; (b) his wife suffers from a physical disability or incurable disease; (c) his wife cannot bear any child." See also points 4 (d) and (e) of the General Elucidation of the Official Elucidation of MA 1974, the complete quotation of which is as stated below.

[36] See points 4 (d) and (e) of the General Elucidation of the Official Elucidation of MA 1974. *"Azas-azas atau prinsip-prinsip yang tercantum dalam Undang-Undang ini adalah sebagai berikut: … (d) Undang-Undang ini menganut prinsip, bahwa calon suami-istri itu harus telah masak jiwa raganya untuk dapat melangsungkan perkawinan, agar supaya dapat mewujudkan tujuan perkawinan secara baik tanpa berakhir pada perceraian dan mendapat keturunan yang baik dan sehat. Untuk itu harus dicegah adanya perkawinan antara calon suami-istri yang masih di bawah umur. Di samping itu, perkawinan mempunyai hubungan dengan masalah kependudukan. Ternyatalah bahwa batas umur yang rendah bagi seorang wanita untuk kawin, mengakibatkan laju kelahiran yang tinggi jika dibandingkan dengan batas umur yang lebih tinggi, Berhubungan dengan itu, maka Undang-Undang ini menentukan batas umur untuk kawin baik bagi pria dan wanita, ialah 19 (sembilan belas) tahun bagi pria dan 16 (enam belas) tahun bagi wanita. (e) Karena tujuan perkawinan adalah untuk membentuk keluarga yang bahagia kekal dan sejahtera, maka Undang-Undang ini menganut prinsip untuk mempersukar terjadinya perceraian. Untuk memungkinkan perceraian, harus ada alasan-alasan tertentu serta harus dilakukan di depan Sidang Pengadilan."* Translation: "The principles set out in this Law are as follows: … (d) This Law follows the principle that candidate husband and wife must have been mentally and physically mature to be able to enter into a marriage so that they are able to realize the purposes of marriage properly without ending up in a divorce and to have good and healthy descendants. A marriage between underaged candidate husband and wife must therefore be prevented. In addition, marriage has a relation to population affairs. It is evident that a low limit of age for women to marry results in a higher birth rate if compared to the results of a higher limitation of age for a marriage. In relation to it, this Law sets the limit of age to marry both for men and women at 19 (nineteen) years and 16 (sixteen) years, respectively. (e) As the purpose of marriage is to establish a happy, lasting and prosperous family, this Law follows a principle which makes a divorce more difficult. To allow for a divorce, there must be certain reasons and must be conducted before a Court Hearing."

[37] Art. 31 (1) and (2) of MA 1974. Art. 31: *"(1) Hak dan kedudukan istri adalah seimbang dengan hak dan kedudukan suami dalam kehidupan rumah tangga dan pergaulan hidup bersama dalam masyarakat. (2) Masing-masing pihak berhak untuk melakukan perbuatan hukum."* Translation: "(1) The rights and position of a wife shall be equal to the rights and position of a husband in the household life and social life in the community. (2) Each party shall be entitled to take a legal action." See also point 4 (f) of general elucidation of the Elucidation of MA 1974.

last principle states that a marriage must be registered with a Vital Records Office for legal evidence.[38]

MA 1974 contains fourteen chapters which stipulate details and descriptions of the marriage principles above. Chapter 1 (Art. 1-5) of MA 1974 stipulates the basic principles of marriage. Chapter II (Art. 6-12) of MA 1974 stipulates the requirements for a marriage. Chapter III (Art. 13-21) of MA 1974 contains the prevention of marriage followed by Chapter IV (Art. 22-28) of MA 1974 regarding the cancellation of marriage. Chapter V (Art. 29) of MA 1974 contains the pre-marital agreement in relation to marital assets. Chapter VI (Art. 30-34) of MA 1974 contains the rights and obligations of husband and wife and the next chapter, Chapter VII (Art. 35-37) of MA 1974 stipulates marital assets. Assets acquired during a marriage are common assets, while assets belonging to each couple before the marriage and assets given as presents or inheritance belong to the relevant party on his/her own, except otherwise stipulated in their marital agreement. Chapter VII (Art. 38-41) of MA 1974 stipulates marriage termination and its consequences, while Chapter IX (Art. 42-44) and Chapter X (Art. 45-49) of MA 1974 respectively specify the position of children as well as the rights and obligations of children and parents. Chapter XI (Art. 50-54) of MA 1974 provides for guardianship. Chapter XII (Art. 55-63) of MA 1974 stipulates other matters consisting of evidence of the origin of children, a marriage concluded outside the territory of Indonesia, mixed marriage and court. Chapters XIII (Art. 64-65) and XIV (Art. 66) of MA 1974 stipulate the final provisions containing the transitional provisions and closing articles.

Based on the stipulations in MA 1974, a marriage in Indonesia covers more than a civil relationship between the husband and wife and or children. Some other aspects are also

[38] Art. 2 (2) of MA 1974. "*(2) Tiap-tiap perkawinan dicatat menurut peraturan perundang-undangan yang berlaku.*" Translation: "(2) Each marriage shall be registered conform in accordance with laws and regulations." See also point 4 (b) of General Elucidation of the Official Elucidation of MA 1974: *"Azas-azas atau prinsip-prinsip yang tercantum dalam Undang-undang ini adalah sebagai berikut: …(b) Dalam Undang-undang ini dinyatakan, bahwa suatu perkawinan adalah sah bilamana dilakukan menurut hukum masing-masing agamanya dan kepercayaannya itu; dan di samping itu tiap-tiap perkawinan harus dicatat menurut peraturan perundang-undangan yang berlaku. Pencatatan tiap-tiap perkawinan adalah sama halnya dengan pencatatan peristiwa-peristiwa penting dalam kehidupan seseorang, misalnya kelahiran, kematian yang dinyatakan dalam Surat-surat keterangan, suatu akta resmi yang juga dimuat dalam daftar pencatatan."* Translation: "The principles set out in this Law shall be as follows: … (e) This Law states that each marriage shall be lawful if it is conducted in accordance with laws of the respective religion and belief of the parties; and in addition, each marriage must be registered according to the applicable laws and regulations. Registration of each marriage shall be the same as registration of important events in a person's life, for instance birth, death stated in a certificate, an official deed which is also set out in a list of registration."

covered in MA 1974, i.e. religious value, biological aspect, demographic aspect, in addition to the *Adat* Law.[39]

Religious values are mentioned in Art. 1 (2), Art. 8 sub (f), and Art. 51 (3). Biological aspect is reflected in Art. 4 (2), which sets out the health condition of an existing wife. In the event an existing wife has an incurable illness or incapable of pregnancy or infertility, provided that the husband meets the other requirements, he is allowed of polygamy. Demographic aspect is revealed in Art. 7 and its official elucidation, with stipulation of the minimum age for a marriage aimed at suppressing population growth rate.

Adat law principles are reflected in Art. 31 and Art. 36 of MA 1974. They replace the previous stipulation of the rights and obligations of husband and wife. Art. 31 of MA 1974 states that husband and wife have equal rights and position in the society. Each of them is entitled to take any legal actions.[40] Assets belonging to husband and wife before they get married are still in the possession of each husband and wife privately.[41] Their assets before marriage are not unified and become common matrimonial assets. Only assets acquired during their marriage will become matrimonial assets, provided that no agreement between them states otherwise.

2.2 Definition of Marriage in MA 1974

MA 1974 states the definition of marriage in Art. 1, namely a physical and spiritual relationship between a man and a woman as husband and wife in order to create an

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[39] Wahyono Darmabrata mentioned that MA 1974 has several aspects, i.e. religious value, biological aspect, sociology, *Adat* Law and Legal Norms. See Wahyono Darmabrata, *Tinjauan Undang-undang No. 1 tahun 1974 tentang Perkawinan beserta Undang-undang dan Peraturan Pelaksanaannya,* Op.Cit., pp. 4-5.

[40] Art. 31 (1) and (2) of MA 1974. "*(1) Hak dan kedudukan istri adalah seimbang dengan hak dan kedudukan suami dalam kehidupan rumah tangga dan pergaulan hidup bersama dalam masyarakat. (2) Masing-masing pihak berhak untuk melakukan perbuatan hukum.*" Translation: "(1) Rights and position of a wife shall be equal to the rights and position of a husband in a household life as well as in the social life in the society. (2) Each party shall be entitled to conduct any legal actions."

[41] Art. 36 of MA 1974. "(1) Mengenai harta bersama, suami dan istri dapat bertindak atas persetujuan kedua belah pihak. (2) Mengenai harta bawaan masing-masing suami dan istri dan harta benda yang diperoleh masing-masing sebagai hadiah atau warisan adalah di bawah penguasaan masing-masing sepanjang para pihak tidak menentukan lain." Translation: "(1) With respect to matrimonial assets, a husband and wife may act upon the approval of both parties. (2) With respect to default assets of each husband and wife and assets obtained respectively as present or inheritance shall be under the control of each party insofar as the parties do not determine otherwise."

eternal happy family based on the Almighty God.[42] This definition breaks the silence due to absence of the definition of marriage in the previous laws and regulations.[43]

This definition of marriage apparently shows some aspects which become the principles of MA 1974. This definition mentions about the meaning and objective of a marriage as well as the physical and emotional connection. The emotional bond is somewhat vague. However, the physical bond is a legal relationship between a man and a woman in a formal means which can be seen and proven.

It is mentioned that a marriage is a relationship between a man and a woman as husband and wife. This first phrase limits a marriage in Indonesia to a heterosexual couple more than merely living together in a partnership relation. This phrase is believed as the limitation of marriage in Indonesian thus it is only for a heterosexual couple; therefore, same sex marriage or gay marriage is forbidden.[44]

The definition of marriage also reflects the monogamy principle due to the limitation to relationship between a man and a woman at the same time. It shows that a man must marry a woman, instead of some women at the same time and it is applied vice versa. Polygamy and/or polyandry are, therefore, forbidden in Indonesia. However, polygamy

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[42] Art. 1 of MA 1974, *"Perkawinan ialah ikatan lahir batin antara seorang pria dengan seorang wanita sebagai suami istri dengan tujuan membentuk keluarga (rumah tangga) yang bahagia dan kekal berdasarkan Ketuhanan Yang Maha Esa"*. Translation: "A marriage shall be a physical and spiritual bond between a man and a woman as a husband and wife with the purpose of establishing a happy and lasting family based on belief in the Almighty God."

[43] Absence of the definition of marriage makes academic writings before MA 1974 use the definition of marriage formulated by the leading scholars at that time, among others Wirjono Prodjodikoro who states that a marriage is a condition whereby a man and woman live together by meeting the requirements of formality, performance, continuation and discontinuation or termination of the same. This definition is derived from the biological perspective and will be determined by the applicable law of the state where the couple are domiciled. Such objective concludes that having a descendant or an heir is not the ultimate purpose of a marriage and therefore, absence of descendant is not a reason for any occurrence of divorce. Therefore, a marriage may also be concluded in an extreme circumstance, such as a marriage when a person nearly passes away. See Wirjono Prodjodikoro, *Op.Cit.*, 9th ed., pp. 7-8.

Another scholar is Subekti, who states slightly differently that a marriage is a formal or valid relationship between a man and a woman for a long period of time. The definition above describes that the objective of a marriage is to live together, is related with human's need as a *zoon politicon* and further becomes exclusive between a woman and man as a couple. This unity may carry any descendants through a natural birth in the family. See Subekti, *Pokok-pokok Hukum Perdata (Principles of Civil Law),* (Jakarta: PT Intermasa, 1996), 28th ed., p. 23.

Definitions by Wirjono Prodjodikoro and Subekti survive amongst scholars until the promulgation of MA 1974 which gives a legal definition afterwards. These definitions were the central of marriage discussions because at that time, no definition was given thereto, even by the prevailing laws and regulations.

[44] Some scholars mention that same-sex marriage is forbidden as it refers to the religion and belief as the foundation of marriage.

is not absolutely forbidden. MA stipulates strict limitation or requirements in its articles to allow a man to have more than one wife.[45] Hence, the monogamy principle in MA 1974 should be mentioned as a limited monogamy principle, instead of absolute monogamy.[46]

A marriage has an objective namely to create an eternal happy family based on the Almighty God or on religious ground. The last phrase in MA 1974 relates a marriage in Indonesia to the spiritual or religious aspect at all times. The spiritual aspect is reflected in the requirement that couples must obey the provisions and requirements of their religion and validation. For instance, permission and restrictions which apply in the religion of couple-to-be also apply as substantive requirements.[47] Further, Art. 2 of MA 1974 states that a marriage is valid if it is solemnized according to the couple's religion.[48] Based on this provision, some scholars conclude that a marriage must be held according to the religion's law and therefore, no marriage is validly held if it is not in line with the religion's law of the respective couple.[49]

The definition above affects the process of marriage as referred to in Art. 2 of MA 1974. An Indonesian marriage is legal and valid if such marriage is concluded according to the respective couple's religion and is then registered.[50] After the religious ceremony is held, the couple must register their marriage with the local Registration Office, the Vital Records Office (*Kantor Catatan Sipil*) for a non-Moslem couple and Religious Affairs

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[45] This topic will be more elaborated in section 2.5, including its legal basis as stipulated in Art. 4 (2), 4, and 5 of MA 1974, as well as point 4 (c) of the Official Elucidation of MA 1974.

[46] Point 4 (c) of the Official Elucidation of MA 1974. "*Undang-undang ini menganut azas monogami. Hanya apabila dikehendaki oleh yang bersangkutan, karena hukum dan agama dari yang bersangkutan mengizinkannya, seorang suami dapat beristri lebih dari seorang. Namun demikian perkawinan seorang suami dengan lebih dari seorang istri, meskipun hal itu dikehendaki oleh pihak-pihak yang bersangkutan, hanya dapat dilakukan apabila dipenuhi berbagai persyaratan tertentu dan diputuskan oleh Pengadilan.*" Translation: "This Law adopts the monogamy principle. Only when it is desired by the parties concerned, a husband may have more than one wife. However, the marriage of a husband with more than one wife, even though it is desired by the parties concerned, may only be conducted if various certain requirements are met and it is decided by a Court."

[47] Art. 8 (f) of MA 1974, "*Perkawinan dilarang antara dua orang yang: … (f) mempunyai hubungan yang oleh agamanya atau peraturan lain yang berlaku, dilarang kawin.*" Translation: "*A marriage shall be prohibited between two persons who: … (f) have a relationship which is prohibited from marrying by their religion or other prevailing regulations.*"

[48] Art. 2 (1) of MA 1974 "*(1) Perkawinan adalah sah, apabila dilakukan menurut hukum masing-masing agamanya dan kepercayaannya itu.*" Translation: "(1) A marriage shall be valid if it is held according to the law of religion and belief of the respective parties."

[49] Hilman Hadikusuma and Zulfa Djoko Basuki are some experts who support that opinion.

[50] Art. 2 (1) of MA 1974. Please see footnote No. 20 above.

Office (*Kantor Urusan Agama*) for a Moslem couple.[51] The marriage registration constitutes the evidence of marriage. In other words, a marriage certificate or marriage book (*Buku Nikah*) issued by the Vital Records Office or Religious Affairs Office shall be authentic and legal evidence. A decision of the Supreme Court of Indonesia confirms it by stating that a marriage can only be proven by a marriage certificate or marriage book issued by the Vital Records Office or Religious Affairs Office, thus such registration becomes *prima facie* of a valid marriage.[52]

A marriage is registered pursuant to the prevailing laws and regulations, as provided in Art. 2 (2) of MA 1974.[53] This marriage registration constitutes one of the registrations which must be made with the Vital Records Office since it is considered as an important legal event in the life of a legal subject.[54] The registration constitutes valid evidence of the existence of marriage with all of its legal consequences, not only for the husband and wife but also for any third parties, pursuant to Law No. 23 of 2006 regarding Civil Administration (hereinafter referred to as the "**Civil Administration Law**".[55]

The provisions provided in MA 1974 constitute a significant alteration compared to the previous marriage laws. MA 1974 introduces a unified marriage law to replace the plural system of family laws which previously has been in existence.[56] MA 1974 amends the

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[51] Art. 2 (2) of MA 1974 *jo* Art. 2 (1) and (2) of GR No. 9 of 1975. Art. 2 (2) of MA 1974, *"(2) Tiap-tiap perkawinan dicatat menurut peraturan perundang-undangan yang berlaku."* Translation: "Each marriage shall be registered according to the prevailing laws and regulations."

[52] Zulfa Djoko Basuki, *Op.Cit.,* p. 9. See further the presentation of J.C.T. Simorangkir in Weinata Sairin and J.M. Pattiasina, *Pelaksanaan Undang-undang Perkawinan dalam Perspektif Kristen (Implementation of the Marriage Law in the Christian Perspective)*, (Jakarta: PT. BPK Gunung Mulia, 1996), pp. 45-46.

[53] Art. 2(2) of MA 1974. Please see footnote No. 23 above.

[54] The Civil Administration Law obligates registration for each important event of a legal subject from his birth until death, among others marriage, divorce, and adoption. Art. 3 of the Civil Administration Law states that "*Setiap penduduk wajib melaporkan Peristiwa Kependudukan dan Peristiwa Penting yang dialaminya kepada Instansi Pelaksana dengan memenuhi persyaratan yang diperlukan dalam Pendaftaran Penduduk dan Pencatatan Sipil.*" Translation: "Each resident shall be obligated to report any Population Event and Important Event undergone by him/her to the Implementing Agency by meeting all requirements required in Population Registration and Vital Records." According to Art. 1 of the Civil Administration Law, Important Event is defined as *"Peristiwa Penting adalah kejadian yang dialami seseorang meliputi kelahiran, kematian, lahir mati, perkawinan, perceraian, pengakuan anak, pengesahan anak, pengangkatan anak, perubahan nama dan perubahan status kewarganegaraan."* Translation: "Important Event shall be an event experienced by a person including birth, death, stillbirth, marriage, divorce, child recognition, child validation, child adoption, change of name and change of nationality."

[55] Indonesia, Law No. 23 of 2006 regarding Civil Administration, State Gazette No. 124 of 2006, as amended by Law No. 24 of 2013 regarding the Amendment to Law No. 23 of 2006 regarding Civil Administration, State Gazette No. 232 of 2013.

[56] For the European group, the applicable marriage law is BW and its registration is stipulated in State Gazette No. 1849/25, *Burgerlijke Stand voor Europeanen*. For the Oriental group, its registration is held before a

concept of marriage before the law, from merely a civil relationship to a civil relationship with a religious aspect. The marriage obligation is added by holy matrimony or religious matrimonial ceremony to validate a marriage.

Nowadays, BW survives partially in Indonesia following its independence, based on the Transitional Provision Art. I of the 1945 Indonesian Constitution. It states that the existing laws and regulations remain effective insofar as new laws and regulations have not been promulgated based on the Constitution.[57] Some parts of BW are no longer effective due to promulgation of laws and regulations as replacement for the same matters. For instance, MA 1974 replaces the marriage provisions, while Law No. 6 of 1960 replaces the agrarian provisions. Law No. 42 of 1999 replaces the fiduciary law and some specific articles which were considered out of date. Those articles are then revoked based on Circular Letter of the Supreme Court No. 3 of 1963 dated 4 August 1963.[58]

Previously, as a consequence of application of the constitution of *Netherlands Indischë* (the *Indische Staatsregeling*/*"***IS***"*) in 1849, the society was divided into three groups, i.e. Europeans who were subject to the Netherlands private law the so-called BW,

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Registry Office pursuant to S.1919/81. For Christian Natives in Java, Minahasa and Ambon, pursuant to S.1933/74, and its registration is held before a Registry Office pursuant to S.1919/75. A mixed marriage stipulated in the *Regeling op de Gemengde Huwelijken* (hereinafter, GHR) S.1989/158 and its registration shall be based on S.1904/279. For non-Chinese foreigners, it shall be held pursuant to its customary law without any registration with a Registry Office. For other native groups, the applicable law is the *Adat Law* which recognize the *matriachaat* system, *patriarchate system*, and parental system. Further see Weinata Sairin and J.M. Pattiasina, *Op.Cit.,* pp. 83-84. After the independence of RI, Moslem Natives are subject to Law No. 32/1954 regarding *Nikah, Talak dan Rujuk*. For some scholars, this law is considered to be merged with and therefore, is accepted as the *Adat Law*.

[57] "*Segala peraturan perundang-undangan yang ada masih berlaku selama belum diadakan yang baru menurut undang-undang ini.*" Translation: "All existing laws and regulations shall remain valid as long as new laws and regulations have not been introduced according to this law." Previously, it was Article II of the Transitional Provisions, and then became Art. I as a result of the fourth amendment to the 1945 Indonesian Constitution.

[58] The revoked articles are: (1) Art. 108 and Art. 110 of BW regarding a wife's authority to take a legal action. Therefore, a wife is also authorized to take legal actions and has capabilities equal to her husband. (2) Art. 284 (3) of BW regarding child recognition. Therefore, any recognition of a child will not dismiss the legal relationship between the mother (who is an Indonesian Native) and child. This revocation causes no more discrimination within Indonesian people. (3) Art. 1682 of BW which stipulates that any grant (*hibah*) must be based on a notarial legal document. (4) Art. 1579 of BW which stipulates that in a lease or rent agreement, an owner cannot terminate the agreement for a reason that he/she wants to use the goods constituting the object of the lease agreement, unless previously agreed. (5) Art. 1238 of BW which states that a debtor shall be deemed in default, either by an order or other similar deeds, or pursuant to the obligation itself, if such obligation stipulates that the debtor shall be in default, upon failure in delivery within the stipulated period. (6) Art. 1460 of BW which stipulates that if a buyer concludes and establishes a particular sale object, since that moment such object shall be borne by the buyer even though delivery has not been made yet. (7) Art. 1603x which establishes a discrimination between Europeans and non-European in a working agreement.

Natives to their own *Adat* law and Foreign Orientals to their own customary law.[59] The division resulted in several marriage laws which were applicable at the same time. Such condition is recorded in the Elucidation of MA 1974 which describes about the legal pluralism prior to the application of MA 1974.[60]

BW regulates that the validity of marriage depends on marriage registration with the local or relevant Vital Records Office, instead of any religious matrimonial ceremony. The religious matrimonial ceremony could be followed by registration, however, it does not validate such marriage. It is merely a confirmation and blessing from priesthoods upon the newly married couple.[61]

Prior to MA 1974, marriage registration at a Vital Records Office was mandatory. A marriage was only considered valid if it is registered with the Vital Records Office. A religious ceremony did not influence its validity. At that time, the church was of the opinion that a marriage is a legal event rather than a religious event. Therefore, the church only gave blessings to a marriage, instead of validation. In other words, a religious matrimonial ceremony did not establish a valid marriage or become the basis for any legal marriage. As a consequence, there was a possibility that a marriage was

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[59] *Indische Staatsregeling*, State Gazette No. 3415 of 1925, Art. 163 *jo*. Art. 131. See also Sunarjati Hartono, *Dari Hukum Antar-Golongan ke Hukum Antar Adat (From Intergroup Law to Inter-Adat Law),* (Bandung: Alumni, 1971), pp. 5-6, Sudargo Gautama, *Suatu Pengantar Hukum Antar Golongan (Introduction to Intergroup Law),* pp. 41-46; Eman Suparman, *Hukum Perselisihan, Konflik Kompetensi dan Pluralisme Hukum Orang Pribumi (Conflict Law, Conflict of Competence and Legal Pluralism of Natives)*, (Bandung: Refika Aditama, 2005), pp. 38-41; Djaja Meliala, *Perkembangan hukum Perdata tentang Orang dan Hukum Keluarga (Development of Civil Law regarding Person and Family Law),* Revised Edition (Jakarta: Nuansa Aulia, 2007), pp. 22-34. With respect to grouping due to Civil Registration, see Winarsih Imam Subekti and Sri Soesilawati Mahdi, *Hukum Perorangan dan Kekeluargaan Perdata Barat, (Western Civil Personal and Family Law)* (Jakarta: Gitama Jaya Jakarta, 2005), pp. 20-24.

[60] Point 2 of the Official Elucidation of MA 1974. "Dewasa ini berlaku berbagai hukum perkawinan bagi berbagai golongan warganegara dan berbagai daerah seperti berikut: (a) *bagi orang-orang Indonesia Asli yang beragama Islam berlaku hukum Agama yang telah diresipir dalam Hukum Adat; (b) bagi orang-orang Indonesia asli lainnya berlaku Hukum Adat; (c) bagi orang-orang Indonesia asli yang beragama Kristen berlaku Huwelijksordonantie Christen Indonesia (S.1933 Nomor 74); (d) bagi orang Timur Asing Cina dan warganegara Indonesia keturunan Cina berlaku ketentuan-ketentuan Kitab Undang-undang Hukum Perdata dengan sedikit perubahan; (e) bagi orang-orang Timur Asing lain-lainnya dan warganegara Indonesia keturunan Timur Asing lainnya berlaku Hukum Adat mereka; (f) bagi orang-orang Eropa dan warganegara Indonesia keturunan Eropa dan yang disamakan dengan mereka berlaku Kitab Undang-undang Hukum Perdata.*" Translation: "At present, various marriage laws apply to various groups of citizens and various regions, as follows: (a) for Native Indonesian Moslems, the Religious law as absorbed in the *Adat* Law shall apply; (b) for the other Native Indonesians, the *Adat* Law shall apply; (c) for Native Indonesian Christians, the Ordinance on Indonesian Christian Marriages (S.1933 No. 74) shall apply; (d) for Chinese Orientals and Chinese descendant Indonesian citizens, provisions of the Civil Code with minor amendments shall apply; (e) for other Eastern Foreigners and Eastern Foreigner descendant Indonesian citizens, their Adat Law shall apply; (f) for Europeans and European descendant Indonesian citizens and their equivalent, the Civil Code shall apply."

[61] Djaja Meliala, *Perkembangan hukum Perdata tentang Orang dan Hukum Keluarga (Development of Civil Law regarding Person and Family Law), Op.Cit.,* pp. 82-83. Zulfa Djoko Basuki, *Op.Cit.,* pp. 6-9.

valid but did not have any blessings from the church. It is a logical consequence of separation between the religion and state adopted by the Netherlands at that time and the background of Art. 26 only covers the civil relationship between a husband and wife.[62]

Pursuant to BW, a religious ceremony is prohibited if the couple cannot present any evidence to their religious affairs official or clergy that their marriage has been registered with a Vital Records Office. It is stated in Art. 81 of BW, *"No religious matrimony may be held, before both parties prove to a religious affairs official that a marriage has been held before a Vital Records Officer."*[63] In addition, the criminal provision stipulates that a religious affairs official may be fined for holding a religious marriage matrimony prior to any registration with a Vital Records Office.[64]

BW requires that a marriage must have the consent of the couple, and must be between a man and a woman meaning that polygamy and gay-marriage are forbidden. This stipulation is also considered as a public policy and therefore, a marriage can be cancelled which will be further discussed in the paragraph below.

2.3 Conditions for a Marriage

2.3.1 Substantive Conditions

The requirements for a marriage cover the mutual consent of the couple, minimum age, parents' approval and marriage prohibitions. Comparison to the previous marriage law, BW, will be made to have a better understanding.

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[62] Art. 26 of BW. "*The law shall only recognize a marriage in a civil relationship (BW.81).*" "*Undang-undang memandang soal perkawinan hanya dalam hubungan-hubungan perdata.*" In Dutch: "*De wet beschouwt het huwelijk alleen in deszelfs burgerlijke betrekkingen (BW.81).*" See also Djaja S. Meliala, *Hukum Perdata dalam Perspektif BW (Civil Law in BW Perspective),* 3rd revised edition (Bandung: Publisher Nuansa Aulia, 2012), pp. 49-50. Ali Afandi, *Hukum Waris, Hukum Keluarga, Hukum Pembuktian (Succession Law, Family Law, Evidence Law),* 4th revised edition (Jakarta: Rineka Cipta, 1997), pp. 98-100.

[63] Art. 81 of BW. "*Tidak ada upacara keagamaan yang boleh diselenggarakan, sebelum kedua belah pihak membuktikan kepada pejabat agama bahwa perkawinan di hadapan Pegawai Catatan Sipil telah berlangsung.*" In Dutch: "*Geene godsdienstige plegtigheden zullen vermogen plaats te hebben, voor dat de partijen aan den bedienaar van hunne eeredienst zullen hebben doen blijken, dat het huwelijk ten overstaan van den ambtenaar van den burgerlijken stand is voltrokken. (Bw.26; Sw.530.)*".

[64] Art. 279 (1) of KUHP: "(1) *Diancam dengan kurungan pidana penjara paling lama lima tahun: (1) Barang siapa mengadakan perkawinan padahal mengetahui bahwa perkawinan atau perkawinan-perkawinannya yang telah ada menjadi penghalang yang sah itu; (2) barang siapa mengadakan perkawinan padahal mengetahui bahwa perkawinan atau perkawinan-perkawinan pihak lain menjadi penghalang untuk itu.*" Translation: "(1) By a maximum imprisonment of five years shall be punished: (1) any person who enters into marriage knowing that his existing marriage or marriages present a legal barrier against it; (2) any person who enters into marriage knowing that the existing marriage or marriages of the counterpart present a legal barrier against it."

Marriage law in BW is stipulated in Art. 26 up to Art. 249 under Title IV regarding Marriage up to Title XI regarding the Separation of Table and Bed. BW stipulates both the substantive requirements and formality to hold a marriage which must be fulfilled by the respective couple. In addition, it also stipulates the rights and obligations or civil relationship formed between the husband and wife, including its legal consequences.

2.3.1.1 Mutual consent

MA 1974 specifies that a marriage can only be held based on mutual consent of the couple.[65] Parties in a marriage must be free from any pressure or coercion by any parties, either their guardians or even their own parents. This provision is made to prevent any forced marriage or any arranged marriage which used to occur in the Indonesian society. The other reasons are basic human rights as well as the objective of marriage itself. A marriage between a husband and wife is about to establish an everlasting marriage and happy family. It will be difficult without any willingness from the respective parties.[66]

Mutual consent of the respective parties in a marriage is ultimate or vital, yet it does not set the other requirements aside, among others parents' approval, minimum age, etc. Mutual consent in a marriage is not the same as mutual consent to enter into an ordinary agreement or contract, due to its objective, solemnization of the mutual consent, reason for termination.[67]

The ultimate requirement is also the same as BW. It requires mutual consent of the couple, without any pressure from any third parties to enter into a marriage, as stated by

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[65] Art 6 (1) of MA 1974. *"Perkawinan didasarkan atas persetujuan kedua calon mempelai."* Translation: *"A marriage shall be based on the approval of both prospective spouse".*

[66] Djaja Meliala, *Op.Cit.,* pp. 74-76; Ali Fandi, *Op.Cit.,* pp. 99-100. They are of the opinion that the mutual consent is not equivalent to the mutual consent in Book III regarding Obligations and Agreements due to, among others, coverage to third parties, solemnization of consent, background of termination. See also Zulfa Djoko Basuki, *Op.Cit.,* pp. 10.

[67] *Ibid*. The Official Elucidation of Art. 6 of MA 1974: *"Oleh karena perkawinan mempunyai maksud agar suami dan istri dapat membentuk keluarga yang kekal dan bahagia, dan sesuai pula dengan hak azasi manusia, maka perkawinan harus disetujui oleh kedua belah pihak yang melangsungkan Perkawinan tersebut, tanpa ada paksaan dari pihak mana pun. Ketentuan dalam pasal ini, tidak berarti mengurangi syarat-syarat perkawinan menurut ketentuan hukum perkawinan yang sekarang berlaku, sepanjang tidak bertentangan dengan ketentuan-ketentuan dalam Undang-undang ini sebagaimana dimaksud dalam Pasal 2 ayat (1) Undang-undang ini."* Translation*: "Since the purpose of a marriage is that a husband and wife can establish an everlasting and happy family, and also in accordance with basic human rights, a marriage must be approved by both parties holding such marriage, without any coercion from any parties. Provisions of this article do not mean to prejudice the requirements for a marriage according to provisions of the currently prevailing marriage law, insofar as not contradicting the provisions of this Law as referred to in Article 2 paragraph (1) of this Law."*

Art. 28 of BW that: *"To enter into a marriage, voluntary consent of the prospective spouse is required."*[68]

2.3.1.2 Minimum age for a marriage

The minimum age for entering into a marriage is nineteen years old for a groom and sixteen years old for a bride.[69] Any exception to this provision can only be made upon approval of the local district court or any other authorized person appointed by the parents, either of the groom or bride.[70]

The first reason behind the minimum age for a marriage is the health of the couple themselves as well as their descendant(s). From the perspective of demographic administration, the purpose of such minimum age is to suppress population growth or to control the population. A lower minimum age for a marriage for women will cause higher population growth.[71] It is also stipulated for the sake of marriage objective itself. This limitation has been imposed to attain a happy marriage and to avoid any divorce. Therefore, the couple should be mature enough before entering into a marriage.

Minimum age in MA 1974 is slightly higher than the recommended minimum age in BW. BW requires the minimum age of groom and bride at 18 and 15 years old, respectively. It is to prevent a minor from entering into a marriage. Stipulation of the minimum age is stated in Art. 29 of BW, namely "*A man may not enter into a marriage until he reaches the age of eighteen years old and a woman may not enter into a marriage until she reaches the age of fifteen years old. The President may, however, for significant reasons, remove this prohibition by granting a dispensation*".[72]

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[68] Art. 28 of BW: *"Asas perkawinan menghendaki adanya kebebasan kata sepakat antara kedua calon suami-istri"*. In Dutch: "*Tot hezen wezen van het huwelijk wordt de vrije toestemming der aanstaande echgenooten vereischt. (BW.61-3o, 62, 63-2o, 65,83, 87v, 95v, 901, Cv 146)*."

[69] Art. 7 (1) of MA 1974. "*Perkawinan hanya diijinkan jika pihak pria sudah mencapai umur sembilan belas tahun dan pihak wanita sudah mencapai umur enam belas tahun.*" Translation: "A marriage shall be only allowed if a groom has reached nineteen years old and a bride has reached sixteen years old."

[70] Art. 7 (2) of MA 1974. "*Dalam hal penyimpangan terhadap ayat (1) pasal ini dapat meminta dispensasi kepada Pengadilan atau pejabat lain yang ditunjuk oleh kedua orang tua pihak pria maupun pihak wanita.*" Translation: "In the event of deviation from paragraph (1) of this article, dispensation may be requested from a Court or any other officers appointed by both parents of the groom or bride."

[71] The Official Elucidation of MA 1974, particularly point 4 (d) and Art. 7 (1). The Official Elucidation of point 4 (d) of MA 1974. See Footnote No. 6 above. The Official Elucidation of Art. 7 of MA 1974 states as follows: *"(1) Untuk menjaga kesehatan suami-istri dan keturunan, perlu ditetapkan batas-batas umur untuk perkawinan."* Translation: "(1) To maintain the health of a husband and wife as well as descendants, it is necessary to set the limits of age for a marriage."

[72] Art. 29 of BW: "*Seorang jejaka yang belum mencapai umur genap 18 tahun, seperti pun seorang gadis yang belum mencapai umur genap 15 tahun, tak diperbolehkan mengikat dirinya dalam perkawinan. Sementara*

It is noteworthy that this minimum age for a marriage is not the same as the age of maturity of a person. In addition, minimum age for a marriage of a bride needs to be reconsidered – according to the author. Both points will be discussed below.

2.3.1.2.1 Age of maturity for a marriage in MA 1974 and minimum age for a marriage

Maturity is essentially associated with whether or not a person can take responsibility for his/her legal actions, which describes the capacity to take legal actions, particularly in the civil field.[73] The age of maturity is closely related to the minimum age for a marriage or authority of the parents or guardians.

Notion of the age of maturity of 18 years old, referring to Art. 47[74] or Art. 50[75] of MA 1974 or even other laws and regulations[76], is commonplace in Indonesia.[77] Reference to Art. 47 of MA 1974 is sometimes complemented with Art. 48 of MA 1974 to confirm the age of maturity.[78] It states that parents are prohibited from assigning the assets of their children except for their interests. Both articles lead to a conclusion that children

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itu, dalam hal adanya alasan-alasan penting, Presiden berkuasa meniadakan larangan ini dengan memberikan dispensasi." In Dutch: "*Een jongman de vollen ouderdom can achtien, en eene jonge dochter den vollen ouder can vijftien Jaren nite bereikt hebbende, mogen geen huwelijk aangaan. De Gouverneur-generaal kan echter, om gewichtige redenen, dit verbod door her verleenen van dipensatie opheffen.Gw.71; ISR.43; BW.61-4o, 62, 63-2o, 65, 83,89; BS.55, 61; Bb. 13416; Civ.144v.; W.en.B. II-283).*"

[73] Wahyono Darmabrata, *Op.Cit.*, pp. 24-36.

[74] Art. 47 of MA 1974, "*(1) Anak yang belum mencapai umur 18 tahun atau belum pernah melangsungkan perkawinan ada di bawah kekuasaan orang tuanya selama mereka tidak dicabut dari kekuasaannya. (2) Orang tua mewakili anak tersebut mengenai segala perbuatan hukum di dalam dan di luar Pengadilan.*" Translation: "(1) A child who has not reached the age of 18 years old and has never held a marriage shall be in the custody of his/her parents insofar as they are not taken from their custody. (2) Parents shall represent the child in any legal actions inside and outside a Court."

[75] Art. 50 of MA 1974. *"(1) Anak yang belum mencapai umur 18 (delapan belas) tahun atau belum pernah melangsungkan perkawinan, yang tidak berada di bawah kekuasaan orang tua, berada di bawah kekuasaan wali. (2) Perwalian itu mengenai pribadi anak yang bersangkutan maupun harta bendanya."* Translation: "(1) A child who has not reached the age of 18 (eighteen) years old or has never held a marriage, not in the custody of parents, shall be in the custody of guardians. (2) The guardianship shall cover personal affairs of the child and his/her properties."

[76] See reference to other prevailing regulations in the Decision of the Constitutional Supreme Court regarding the minimum age for a marriage for brides.

[77] Wahyono Darmabrata, *Op.Cit.*, pp. 28-29.

[78] Hazairin as stated in Wahyono Darmabrata, *Op.Cit.*, pp. 24-36. Art. 48 of MA 1974 *"Orang tua tidak diperbolehkan memindahkan hak atau menggadaikan barang-barang tetap yang dimiliki anaknya yang belum berusia 18 tahun atau belum pernah melangsungkan perkawinan, kecuali apabila kepentingan anak itu menghendakinya."* Translation: "Parents may not transfer a right to or pledge immovable properties of their children who have not reached the age of 18 years old or have never held a marriage, unless the interest of the child requires it.

are incapable to take any legal actions on their own assets because they not adults. Other scholars complement such reference to the age of maturity with Art. 50 of MA 1974 which stipulates guardianship.[79]

If the notion above is juxtaposed with requirement of the minimum age for a marriage, the result is distinctive. In MA 1974, the minimum age for a marriage in MA 1974 is 19 years old for a man and 16 years old for a woman. For those who are under 21 years old, they are obligated to obtain the approval of their parents. As a result, a 18-year old man is an adult, but he needs to wait for a year to be able to marry, and to that end, he still needs to obtain the approval of his parents to marry.

This situation is different from the provision of BW.[80] It states that an adult is a person who is 21 years old or is married before such age.[81] A man at the age of 18 years old and a woman at the age of 15 years old are allowed to marry, and such marriage is not be considered as a child marriage. Such requirement does not prejudice the requirement to obtain the approval of each parent. In case that a bride or groom has reached the age of 30 years old, a marriage may be held without any parents' approval for they are considered relatively grown up to make their own decision.[82] When a couple under 21 years old marry, they will be considered as adults. If they divorce afterward, they will remain as adults because such divorce will not turn them into minors again. The age of maturity is also closely related to the authority of parents and guardians. Art. 330 of BW states that minors are under the authority of their parents. Adults (who are 21 years old

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[79] Asikin Kusumah Atmadja, as quoted by Wahyono Darmabrata, pp. 30-31.

[80] Comparison between the structures of Art. 47 and 50 of MA 1974 is also different. In the structure of MA 1974, Art. 47 is in Chapter X regarding Rights and Obligations of Parents and Children, while Art. 50 is in Chapter XI regarding Guardianship. This structure is different from the structure of BW. BW has Chapter XIV regarding Authority of Parents and Chapter XV regarding Adulthood and Guardianship. The first sub-chapter regarding Adulthood states Art. 330 regarding the minimum age and requirement of maturity of a person, which is not stated in MA 1974. See further elaboration of this in Wahtono Darmabrata, *Op.Cit.,* pp. 20-46.

[81] Par. 1 of Art. 330 of BW. *"Yang belum dewasa adalah mereka yang belum mencapai umur genap dua puluh satu tahun dan tidak kawin sebelumnya. Bila perkawinan dibubarkan sebelum umur mereka genap dua puluh satu tahun, maka mereka tidak kembali berstatus dewasa."* In Dutch: "Minderjarigen zijn de zoodanigen die den vollen ouderdom van een-en-twintig Jaren niet hebben bereikt, en niet vroeger in den echt zijn getreden. Wanneer het huelijk voor hunnen vollen ouderdom van een-en twintig jaren is ontbonden, keeren zij niet tot den staat van minderjarigheid terug."

[82] Art. 42 of BW. *"Anak sah yang telah dewasa, tetapi belum genap 30 tahun, juga wajib untuk memohon ijin bapak dan ibunya untuk melakukan perkawinan. Bila ia tidak memperoleh ijin itu, ia boleh memohon perantaraan Pengadilan negeri tempat tinggalnya dan dalam hal itu harus diindahkan ketentuan-ketentuan pasal-pasal berikut."* In Dutch: "Echte kinderen, die meederjarig zijn, doch den vollen ouderdom van dertig jarig nog niet hebben bereikt zijn insgelijk verplicht om tot het aangaan van een huwelijk de toestemming van hunnen vader en hunne moeder te verzoeken. Wanneer zij die toestemming niet hebben bekomen, kunnen zij de tusschenkomst inroepen van den raad van justitie hunner woonplaats, en zulks met inachtneming der bepalingen van de volgende artikelen."

or above) are no longer under the authority of their parents. The same stipulation is provided for guardianship. Minors who are not under the authority of parents, are under the authority of guardians as stipulated in BW. Based on those provisions, it can be concluded that the age of maturity is independent from a marriage or requirement to marry, the authority of parents or guardians.

Bearing in mind the matters above, it is slightly peculiar to conclude that the age of maturity is 18 years old. It is advisable to conclude that MA 1974 does not straightforwardly stipulate the minimum age of maturity. It is better to amend such point in MA 1974. It is advisable to maintain the age of maturity independently, apart from a marriage or requirement to marry, the authority of parents or guardians for the purpose of consistency.

2.3.1.2.2 Decision of the Constitutional Supreme Court on the Minimum Age for a Marriage

There was a petition for judicial review to increase the minimum age of a bride before the Constitutional Supreme Court. Upon such petition, the Constitutional Supreme Court issued its decision as described in Decision of the Constitutional Supreme Court No. 30-74/PUU-XII/2014.

The petition was submitted by several non-governmental organizations and persons.[83] They petitioned the Constitutional Supreme Court to conduct a judicial review of Art. 7 (1) of MA 1974 particularly the phrase "sixteen years old" (as the minimum age of a bride), as well as Art. 7 (2) of MA 1974 the word "deviation" ("*penyimpangan*") and phrase "other official" *("pejabat lain")*. According to the petitioners, those articles contradicted the rights of children stated in Art. 28A, Art. 28B (1) and (2), Art. 28C (1), Art. 28D (1), Art. 28G (1), Art. 28H (1) and (2), as well as Art. 28I (1) and (2) of the Indonesian Constitution.[84]

The petitioners were of the opinion that the minimum age of a bride (16 years old) is too young. Comparison to other prevailing laws and regulations were presented in the petition as one of the argumentations. It showed that the majority of laws and regulations

[83] Decision of the Constitutional Supreme Court No. 30-74/PUU-XII/2014, pp. 1-3. Zumrotin (Chairman of the Management Board of Women's Health Foundation - *Dewan Pengurus Yayasan Kesehatan Perempuan*), Indry Oktaviani (Director of *Semerlak Cerlang Nusantara* Organization), Fr. Yohana Tantria W. (Executive Coordinator of Society for Gender and Inter-Generation Justice - *Masyarakat untuk Keadilan Gender dan Antar Generasi* (MAGENTA)), Dini Anitasari Sa'baniah (Associate of *Semerlak Cerlang Nusantara Organization*), Hadiyatut Thoyyibah (Staff of Information Management System of the National Secretariate of Indonesian Women Coalition - *Koalisi Perempuan Indonesia* (KPI), Ramadhaniati (Staff of KPI), Foundation of Child Right Monitoring Foundation - *Yayasan Pemantau Hak Anak* represented by Agus Hartono, Indonesian Women Coalition - *Koalisi Perempuan Indonesia* represented by Dian Kartika Sari.

[84] Decision of the Constitutional Supreme Court No. 30-74/PUU-XII/2014, pp. 5-7.

define children as persons under the age of 18 or 21 years old and/or not yet married.[85] Therefore, a bride who is only 16 years old could be considered as a child.

Children's health and education in order to have a better life, particularly female children were the main argument. In addition to such opinion, the petitioners also stated that children do not have enough understanding to give their consent to enter into a marriage. From the existing cases, consent was given by their parents or guardians or judge in the relevant jurisdiction rather than themselves.[86]

Upon this petition, exposition of religious organizations, among others, Hindu, Christian, Moslem, Confucianism was presented.[87] In general, clergies of Hindu, Buddhist, Christian and Confucianism presented the same principle, namely that a bride should be grown up or mature enough before she can enter into a marriage. A Hindu clergy mentioned that 21 years old is the most appropriate time to marry since the bride is adult enough both physically and mentally. A Moslem clergy presented that there is no verse which mentions a specific minimum age for a marriage, but usually, a bride is required to be grown up, healthy and be able to recognize good things compared to bad things so that she can give her consent to marry.[88] The other religions were also of the same opinion.

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[85] *Ibid.*, pp. 11-21. Reference to the prevailing regulations is Article 330 of BW: 21 years old; Law No. 13 of 2003 regarding Employment, Art. 1 point 26: 18 years old. Law No. 4 of 1979 regarding Child Welfare, Art. 1 point 2: 21 years old and not yet married. Law No. 12 of 1995 regarding Correctional Affairs, Art. 1 point 8: 18 years old. Law No. 3 of 1997 regarding Juvenile Court: 8-18 years old and not yet married. Law No. 39 of 1999 regarding Human Rights: 18 years old and not yet married including babies in the womb when their interest is required. Law No. 23 of 2002 regarding Child Protection: 18 years old including babies in the womb. Law No. 23 of 2004 regarding Eradication of Domestic Violence: biological child or step child. Law No. 30 of 2004 regarding Position of Notary: 18 years old or married. Law No. 40 of 2004 regarding Social Security System: married, has a permanent job, or 23 years old. Law No. 12 of 2006 regarding Nationality: 18 years old or not yet married. Law No. 21 of 2007 regarding Eradication of the Criminal Act of Human Trafficking: 18 years old including babies in the womb. Law No. 44 of 2008 regarding Pornography: 18 years old. Law No. 11 of 2012 regarding Juvenile Justice System: 12-18 years old. Decision of the Minister of Justice No. M 02-IZ.01.10 of 1995 regarding Visa, Visiting Visa, Limited Stay Visa, Entry Permit and Immigration Permit: 18 years old and not yet married. Government Regulation No. 35 of 1949 regarding Pension Grant to Widows (and her children) of the late civil servants: 21 years old. Presidential Decree No. 56 of 1996 regarding Evidence of Indonesian Nationality: 18 years old. See Decision of the Constitutional Supreme Court No. 30-74/PUU-XII/2014, pp. 80-85.

[86] Decision of the Constitutional Supreme Court No. 30-74/PUU-XII/2014, pp. 94-96.

[87] *Ibid.,* pp. 156-230. Hindu was represented by *Parisada Hindu Dharma Indonesia (PDHI)*, Christian was represented by *Konferensi Waligereja Indonesia (KWI)* and *Persekutuan Gereja-gereja di Indonesia (PGI)*, Moslem was represented by *Majelis Ulama Indonesia (MUI), Pimpinan Pusat Muhammadiyah*, and *Pengurus Besar Nahdatul Ulama*, Buddhist was represented by *Perwakilan Umat Buddha Indonesia (WALUBI)*, Confucianism was represented by *Majelis Tinggi Agama Khonghucu Indonesia (MATAKIN)*.

[88] See the opinion of Expert Quraish Shihab in Decision of the Constitutional Supreme Court No. 30-74/PUU-XII/2014, p. 230. See also Art. 16 of KHI.

DPR presented that Art. 7 (1) of MA 1974 is a national consensus to provide the minimum age of a brides for a marriage. Such limitation constitutes an open legal policy of the drafters who considered many perspectives and values when MA 1974 was enacted. At that time, the drafters considered that a groom must be 19 years old and a bride must be 16 years old. This policy may be amended according to the current situation if the situations and conditions in the society or science or knowledge change.[89]

As described by experts, a child marriage has a variety of potential problems, ranging from physical health, particularly reproduction health, mental health, psychological and social barriers, and potential economic problems. In the end, these problems may lead to divorce and child negligence. Therefore, the minimum age of a bride should be increased. In addition, as officially mentioned in the elucidation of Art. 7 (1), there is a minimum age limit of a husband and wife in order to maintain the health of the couple and their descendant(s).

The Constitutional Supreme Court rejected the petition, with one concurring opinion from Judge Maria Farida Indrati.[90] The Constitutional Supreme Court in its several decisions[91] considers that the minimum age is an open legal policy which from time to time can be amended by lawmakers or drafter according to the need and development in the society. Such authority is in the lawmakers' hand, and any opinions or suggestions are allowed as long as they do not contradict the Indonesian Constitution.

If the limitation of minimum age will be amended, this kind of issue should be brought to the process of legislative review which falls within the scope of the lawmakers or drafters. They are in the authority to amend the minimum age of bride, instead of the Constitutional Supreme Court. The Constitutional Supreme Court is not in the position to affirm any minimum age that will become a constitutional minimum age for a marriage. If the Constitutional Supreme Court stipulates the minimum age of a bride, this stipulation will prevent any amendment in the future. The Constitutional Supreme Court states that the minimum age is an open possibility, and in the future the minimum age may no longer be 15 years old, but lower or even higher than 15 years old depending on the development of the society. The age of 18 years old may no longer be an ideal age for a woman to be a bride. It may be higher or lower than 18 years old due to the

[89] *Ibid.,* pp. 144-147.

[90] *Ibid.,* pp. 210-240.

[91] Decision of the Constitutional Supreme Court No. 49/PUU-IX/2011 dated October 18, 2011, Decision No. 37-39/PUU-VIII/2010 dated October 15, 2010 and Decision of the Constitutional Supreme Court No. 15/PUU-V/2007 dated November 27, 2007.

development of technology, healthcare, social, cultural, and economic or any other aspects.

Furthermore, the Constitutional Supreme Court also stated that there is no direct impact of the minimum age of a bride to the problems presented by the petitioners. There is no assurance that increase in the minimum age of a bride from 16 years old to 18 years old, will decrease the number of divorces and health problems as well as minimize other social problems. However, it acknowledged that preventive actions must still be taken to prevent any child marriage.

Having considered the matters above, the phrase 16 years old in Art. 7 (1) of MA 1974 is declared not contradicting the Indonesian Constitution. The same decision also applies to the word "deviation" ("*penyimpangan*") and phrase "other officials" ("*pejabat lain*") in Art. 7 (2) of MA 1974. The Constitutional Supreme Court is of the opinion that those phrases constitute the permission allowed by the law and are needed as an "emergency exit" if there is something forced upon the request of the parents or guardians.[92] Therefore, the petition of the petitioners has no legal reason.

In relation to the Constitutional Supreme Court, the author would like to support the concurring opinion. The author supports an amendment to the minimum age due to the marriage objective itself, namely to achieve a have happy live and descendant. A marriage requires consent both of the groom and bride to be together in any circumstances for the rest of their live.[93] Therefore, the bride and groom should be grown up enough and have become adults to enter into a marriage. Only adults could give their consent and be responsible for their own commitment. In addition, the groom and bride must have good physical conditions to carry good descendants. If a bride is still a child, even though she could get pregnant; she and her baby could not be in a good condition

[92] *Ibid.* According to the Constitutional Supreme Court, the phrase "other officers" is still required as an emergency exit, if parents of the groom or bride and/or their guardians have a difficulty to access the relevant district court for any dispensation. For instance, other officers can be an officer from a Religious Affairs Office (*Kantor Urusan Agama*) or Head of Sub-District or District (*Lurah* or *Camat*) who has the ability or competence to consider whether or not parents can make an exception for their child to marry. This condition or requirement is not considered as intervention engagement from any third parties outside a district court. The requirement is an option as reflected in the word "or/*atau*" which allow parents to choose whether they can obtain a dispensation from a district court or other officers. Therefore, Art. 7 (2) does not contradict the Indonesian Constitution. Therefore, the petition of the petitioners has no legal reason.

[93] Art. 6 (1) of MA 1974. *"Perkawinan didasarkan atas persetujuan kedua calon mempelai."* Translation: *"A marriage must be based on the approval of both prospective spouse".*

since her body is also still growing while her baby is also growing in her womb. The baby and her mother will have higher risks than a pregnant adult woman. [94]

The laws and regulations, which were promulgated before the enactment of MA 1974, have almost the same provision that a child is a person under 18 years old or even 21 years old. After the Indonesian society's understanding of human rights is much more developed compared to the time when MA 1974 was enacted, the 1945 Indonesian Constitution was amended and expressly provided articles about human rights in Chapter X, from Art. 28A to Art. 28J. In addition, Indonesia ratified the *Convention on the Elimination of All Forms of Discrimination against Women*, well-known as the CEDAW Convention.[95] Thereafter, Art. 26 (1) of Law No. 23 of 2002 regarding Child Protection states that parents shall be obligated to prevent any child marriage.[96]

The state's obligation to protect, fulfill and respect children's rights, is not only mentioned in CEDAW but is also stipulated in the 1945 Indonesian Constitution. Regulations issued after the amendment to the Indonesian Constitution and ratification of CEDAW,[97] similarly state that children, being persons under 18 years old and not yet married, must be protected.

A child marriage impacts their education. Children have compulsory formal education for nine years which starts when they are seven years old. Nowadays, such compulsory formal education increases from nine years to twelve years. Therefore, each child in

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[94] Decision of the Constitutional Supreme Court No. 30-74/PUU-XII/2014, p. 236 of the respective decision; "*(a) potensi mengalami kesulitan dan kerentanan saat hamil dan melahirkan anak yang prematur karena belum matangnya pertumbuhan pisik; (b) cenderung melahirkan anak yang kurang gizi, bayi lahir dengan berat badan rendah/kurang atau bayi lahir cacat; ibu beresiko anemia (kurang darah), terjadi eklamsi (kejang pada perempuan hamil), dan mudah terjadi pendarahan pada proses persalinan; (d) meningkatnya angka kejadian depresi pada ibu atau meningkatnya angka kematian ibu karena perkembangan psikologis belum stabil; (e) semakin muda perempuan memiliki anak pertama, semakin rentan terkena kanker serviks; (f) terjadinya trauma dan kerentanan dalam perkawinan yang memicu kekerasan dalam rumah tangga bahkan terjadi perceraian akibat usia anak yang belum siap secara psikologis, ekonomis, sosial, intelektual dan spiritual; dan (g) studi epidemiologi kanker serviks menunjukkan risiko meningkat apabila berhubungan seks pertama kali di bawah usia 15 tahun dan resiko terkena penyakit menular seksual termasuk HIV/AIDS.*"

[95] Indonesia, Law No. 7 of 1984 regarding Ratification of the Convention on the Elimination of All Forms of Discrimination against Women, State Gazette No. 29 of 1984.

[96] Art. 26 (1) of Law No. 23 of 2002 regarding Child Protection. "*Orang tua berkewajiban dan bertanggung jawab untuk: (a) mengasuh, memelihara, mendidik, dan melindungi anak; (b) menumbuh kembangkan anak sesuai dengan kemampuan, bakat, dan minatnya; dan (c) mencegah terjadinya perkawinan pada usia anak-anak.*" Translation: "Parents shall be obligated and responsible to (a) nurture, maintain, educate, and protect their children, (b) develop children according to their capacity, talents and interest; and (c) prevent any child marriage."

[97] Laws refer to: Law No. 39 of 1999 regarding Human Rights, Law No. 23 of 2002 regarding Child Protection, Law No. 13 of 2003 regarding Employment, Law No. 21 of 2007 regarding Eradication of the Criminal Act of Humans Trafficking, and Law No. 44 of 2008 regarding Pornography.

Indonesia is obligated to have education from the 1st grade of elementary school until the 12nd class, equivalent to the third grade of senior high school. The compulsory formal education starts when a child is seven years old and if there is no disturbance during those years, a child can finish his/her education at nineteen years old. The compulsory formal education is the realization of right of each child to education as stipulated in the Indonesian Constitution. The right to education of a child could be restrained if a child enters into a marriage before the completion of his/her education. In addition, if the groom and the bride is under eighteen years old and not yet married, they should be considered as children. If they want to enter into a marriage, as children, they are incapable to give their own consent. At that age, children should be equipped for their future and not to take any responsibility of a marriage and for child care.[98] Therefore, according to the author, it is logical and appropriate to increase the minimum age of a bride.

2.3.1.3 Parent's approval

Parents' approval of a marriage is mandatory if the bride or groom is under twenty-one (21) years old.[99] If one of the parents has passed away, the approval may be given by the existing parent. If both parents have passed away, the approval may be given by guardians, or in the absence of any parents or guardians, the approval may be replaced by a decision of the local district court.[100] For a Moslem bride who marries for the first

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[98] Decision of the Constitutional Supreme Court No. 30-74/PUU-XII/2014, p. 230. Art. 6 (2) of MA 1974. *"(2) Untuk melangsungkan perkawinan seseorang yang belum mencapai umur 21 tahun harus mendapat izin dari kedua orang tua."* Translation: "To hold a marriage, a person who has not reached the age of 21 years old must obtain a permit from both parents."

[99] Art. 6(2) of MA 1974 "*Untuk melangsungkan perkawinan seseorang yang belum mencapai umur dua puluh satu tahun harus mendapat izin kedua orang tua.*" Translation: "To hold a marriage, a person who has not reached the age of twenty-one years old must obtain a permit from both parents ."

[100] Art. 6 (3), (4), (5) of MA 1974. Art 6 (3) of MA 1974 *"(3) Dalam hal salah seorang dari kedua orang tua telah meninggal dunia atau dalam keadaan tidak mampu menyatakan kehendaknya, maka izin dimaksud ayat (2) pasal ini cukup diperoleh dari kedua orang tua yang masih hidup atau dari orang tua yang mampu menyatakan kehendaknya.* (4) *Dalam hal kedua orang tua telah meninggal dunia atau dalam keadaan tidak mampu menyatakan kehendaknya, maka izin diperoleh dari wali, orang yang memelihara atau keluarga yang mempunyai hubungan darah dalam garis keturunan lurus ke atas selama mereka masih hidup dan dalam keadaan dapat menyatakan kehendaknya.* (5) *Dalam hal ada perbedaan pendapat antara orang-orang yang disebut dalam ayat (2), (3) dan (4) pasal ini, atau salah seorang atau lebih di antara mereka tidak menyatakan pendapatnya, maka Pengadilan dalam daerah hukum tempat tinggal orang yang akan melangsungkan perkawinan atas permintaan orang tersebut dapat memberikan izin setelah lebih dahulu mendengar orang-orang tersebut dalam ayat (2), (3) dan (4) pasal ini."* Translation: "(3) In the event that one of the two parents has passed away or is in a condition in which he/she is unable to state his or her intent, the permit referred to in paragraph (2) shall be sufficiently obtained from the surviving parent or the parent who is able to state his or her intent. (4) In the event that both parents have passed away or are in a condition in which they are unable to state their intent, the permit shall be obtained from a guardian, the person who maintain or relative who has consanguinity relationship in direct ascendance insofar as they are still alive and are in a condition in which they are able to state their intent. (5) In the event of different opinion among persons referred to in paragraphs (2),

time, parents' approval (especially of the father) is required and it is independent from the minimum age requirement. Therefore, for a Moslem bride, the approval is required although the bride is older than 21 years old.[101]

The requirements above are almost the same as provisions of BW. In the event that a groom or bride is under the minimum age, approval of their parents or their guardians is required, as referred to in Art. 35 (1) of BW.[102] This approval may be replaced by a court's approval, if parents do not give the said-approval. The permission may be waived if the groom and bride are above 30 years old, as referred to in Art. 42 of BW.[103] A couple above the age of 30 years old are considered mature enough to make their own decision. The last stipulation is the only difference from MA 1974 in relation to parents' approval.

2.3.1.4 Prohibition

The other requirement is the prohibition against a marriage between a couple who are immediate family. Immediate family, for instance, brother and sister or stepbrother and stepsister, family-in-law, is prohibited from marrying. MA 1974 also includes the prohibition of the relevant couple's religion.[104] For instance, the prohibition from

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(3), and (4) of this article, or one or more of them have not made do not state their opinion, a Court in the jurisdiction of the domicile of the person who will hold a marriage at the request of such person may give a permit after first hearing the persons referred to in paragraphs (2), (3), and (4) of this article."

[101] Art. 6 (6) of MA 1974. *"Ketentuan tersebut ayat (1) sampai dengan ayat (5) pasal ini berlaku sepanjang hukum masing-masing agamanya dan kepercayaannya itu dari yang bersangkutan tidak menentukan lain."* Translation: "The provisions referred to in paragraph (1) up to paragraph (5) of this article shall be applicable insofar as the law of religion and belief of the persons concerned does not determine otherwise."

[102] Art. 35 (1) of BW: "*Untuk mengikat diri dalam perkawinan, anak-anak kawin yang belum dewasa harus memperoleh izin dari kedua orang tua mereka.*" Translation: "To bind themselves in a marriage, minor legitimate children must obtain a permit of both of their parents." In Dutch: *"Voor het aangaan van een huwelijk behoeven minderjarige echte kinderen de toestemming hunner ouders."*

[103] Art. 42 (1) of BW. "*Anak-anak kawin yang telah dewasa, namun belum mencapai umur genap 30 tahun, masih juga untuk kawin meminta ijin dari bapak dan ibu mereka.*" Translation: "Legitimate children who are adults, but have not reached the age of 30 years old, must also ask the approval of their father and mother for a marriage." In Dutch: *"Echte kinderen, die meerderjarig zijn, doch den vollen ouderdom van dertig jaren nog niet hebben bereikt zijn insgelijks verplicht om tot het aangaan van een huwelijk de toestemming van hunnen vader en hunne moeder te verzoeken. Wanneer zij die toestemming niet hebben bekomen, kunnen zij de tusschenkomst inroepen van den raad van justitie hunner woonplaats, en zulks met inachtneming der bepalingen van de volgende articles."*

[104] Art. 8 of MA 1974 *"Perkawinan dilarang antara dua orang yang: (a) berhubungan darah dalam garis keturunan lurus ke bawah ataupun ke atas; (b) berhubungan darah dalam garis keturunan menyamping yaitu antara saudara, antara seorang dengan saudara orang tua dan antara seorang dengan saudara neneknya; (c) berhubungan semenda, yaitu mertua, anak tiri, menantu dan ibu/bapak tiri; (d) berhubungan susuan, yaitu orang tua susuan, anak susuan, saudara susuan dan bibi/paman susuan; (e) berhubungan saudara dengan istri atau sebagai bibi atau kemenakan dari istri, dalam hal seorang suami beristri lebih dari seorang; (f) mempunyai hubungan yang oleh agamanya atau peraturan lain yang berlaku, dilarang kawin."* Translation: "8. A marriage shall be prohibited between two persons who: (a) have a consanguinity relationship either in a direct ascending

marrying a family member to a certain level, for example when a man remarries, the second wife may not be the sister or aunt of the existing wife.

BW also provides the prohibition of a marriage.[105] However, such prohibition has no relation to the prohibition of religions and fosterage of "*susuan*". It prevents a couple who have a certain relationship such as stepbrother or stepsister, brother-in-law or sister-

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or descending lineage; (b) have a consanguinity relationship in a horizontal lineage, namely: between siblings, between a person and a sibling of his/her parents and between a person and a sibling of his/her grandparents; (c) have an affinal relationship, namely parents-in-law, step-children, children-in-law or step-parents; (d) have a fosterage relationship, namely foster-parents, foster-children, foster-siblings or foster-aunt or –uncle; (e) have a sibling relationship with the wife or aunt or nephew/niece of the wife, in the event that a husband has more than one wife; (f) have a relationship which is prohibited from marrying by his/her religion or other regulations." Fosterage" or "*susuan*" is a relationship between a child who is breastfed by a woman who is not his or her biological mother. The child is considered as the child of "*susuan*" of that woman.

[105] Art. 30-33 of BW. *"30. Perkawinan dilarang antara mereka yang satu sama lainnya mempunyai hubungan darah dalam garis ke atas maupun garis ke bawah, baik karena kelahiran yang sah, atau karena perkawinan; dalam garis ke samping, antara kakak beradik laki perempuan, sah atau tidak sah.* 31. *Juga dilarang perkawinan: (1) antara ipar laki-laki dan ipar perempuan, sah atau tidak sah, kecuali bila suami atau istri yang menyebabkan terjadinya periparan itu telah meninggal atau bila atas dasar ketidakhadiran si suami atau si istri telah memberikan izin oleh Hakim kepada suami atau istri yang tinggal untuk melakukan perkawinan lain; (2) antara paman atau paman orang tua dengan kemenakan perempuan kemenakan, demikian pula antara bibi atau bibi orang tua dengan kemenakan laki-laki kemenakan, yang sah atau tidak sah. Jika ada alasan-alasan penting, Presiden dengan memberikan dispensasi, berkuasa menghapuskan larangan yang tercantum dalam pasal ini*. 32. *Seseorang yang dengan keputusan pengadilan telah dinyatakan melakukan zina, sekali-kali tidak diperkenankan kawin dengan pasangan zinanya itu. 33. Antara orang-orang yang perkawinannya telah dibubarkan sesuai dengan ketentuan Pasal 199 ayat 3 atau 4, tidak diperbolehkan untuk kedua kalinya dilaksanakan perkawinan kecuali setelah lampau satu tahun sejak pembubaran perkawinan mereka yang didaftarkan dalam daftar Catatan Sipil. Perkawinan lebih lanjut antara orang-orang yang sama dilarang."* Translation: "30. A marriage shall be prohibited between those who one another have a consanguineal relationship in an ascending or descending lineage, either by legitimate birth, or by a marriage; in a horizontal lineage, between brothers and sisters, legitimate or not. 31. A marriage shall also be prohibited: (1) between a brother-in-law and sister-in-law, legitimate or illegitimate, unless the husband or wife who causes such in-law relationship has passed away or if based on the absence of the husband or wife, a Judge has given a permit to the husband or wife left behind to enter into another marriage; (2) between an uncle or great-uncle and niece or great niece, and also between an aunt or great-aunt and nephew or great-nephew, legitimate or illegitimate. If there are important reasons, the President by giving a dispensation, shall be authorized to remove the prohibition set out in this article. 32. A person who by a judicial decision has been declared to have committed adultery, shall never be allowed to marry with his/her partner in such adultery. 33. Persons whose marriage have been dissolved according to the provisions of Article 199 paragraph 3 or 4, shall not be allowed to marry for the second time unless one year has passed since the dissolution of their marriage registered with in the register of Vital Records. A further marriage between the same individuals shall be prohibited. In Dutch: *"30. Het huwelijk is verboden tusschen alle personen, die elkander bestaan in de opgaande ne nerderlande linie, het zij doorwettige, het zij door onwettige geboorte, of door aanhuwelijking, in de zijdlinie tusschen broeder en zuster wettige of onwettige. 31. Ook is het huwelijk verboden: (1) tusschen schoonbroeder en schoonzuster, wettige of onwettige, tenzij de echtgenoot, die de zwagerschap deed ontstaan, is overladen of, op grond van diens afwezigheid aan den achtergebleven echtgenoot door den regter vergunning is verleend een adnder huwelijk aan te gaan; (2) tusschen oon of oud-oom en nicht of achter-nicht, mistgaders tusschen moei of oud-moei en neef of achterneef, wettige of onwettige. 32. Een person, die bij reglterlijk vonnis van overspel is overtuigd, mag nimmer met den medepligtige aan dat overspel in het huwelijk treden. 33. Tusschen personen, wier huwelijk is ontbonden, overeenkomstig het bepaalde in art. 199, 3o of 4o, kan niet ten tweede male een huwelijk worden gesloten, dan natat een jaar is verstreken, sedert de ontbinding van hun vorig huwelijk is ingeschreven in de registers van den burgerlijken stand. Een verder huwelijk tusschen dezelfde, personen is verboden.*

in-law, uncle and his nephew and vice versa, even though the couple is a partner of adultery, including divorced couple and those who want to re-marry.

2.3.2 Formal Conditions

A couple must fulfill certain formal requirements described in Government Regulation No. 9 of 1975 (the "**GR No. 9 of 1975**)".[106] A Moslem couple shall register their marriage with a Religious Affairs Office *(Kantor Urusan Agama - KUA)*, while a non-Moslem couple shall register their marriage with a Vital Records Office; both registration offices hereinafter referred to as the "**Registration Office**". Marriage formality starts from the notification by a couple to a Registration Office of their marriage at least ten days before the date of marriage.[107] A written or verbal notification will be made by the respective couple or their parent or representative.[108] An officer will examine the notification and the fulfilment of marriage conditions to confirm whether or not the couple can marry.[109] He/she will examine, among others the identity, status of each marrying party, religion, domicile, etc. If the couple meets all the requirements, an announcement at a designated place will be made. If there is no objection from any third

[106] Indonesia, Government Regulation No. 9 of 1975 regarding the Implementation of Law No. 1 of 1974 regarding Marriage, State Gazette No. 12 of 1975.

[107] Art. 3 of GR No. 9 of 1975. *"(1) Setiap orang yang akan melangsungkan perkawinan memberitahukan kehendaknya itu kepada Pegawai Pencatat di tempat perkawinan itu akan dilangsungkan. (2) Pemberitahuan tersebut dalam ayat (1) dilakukan sekurang-kurangnya 10 (sepuluh) hari kerja sebelum perkawinan dilangsungkan. (3) Pengecualian terhadap jangka waktu tersebut dalam ayat (2) disebabkan sesuatu alasan yang penting, diberikan oleh Camat atas nama Bupati Kepala Daerah."* Translation: "(1) Every person who will hold a marriage shall notify his intention to a Registration Officer at the place where the marriage will be held. (2) The notification referred to in paragraph (1) shall be made by no later than 10 (ten) working days before the marriage is held. (3) Exception to the period referred to in paragraph (2) caused by an important reason, shall be given by the Head of District on behalf of the Regional Head of District."

[108] Art. 4 of GR No. 9 of 1975. *"Pemberitahuan dilakukan secara lisan atau tertulis oleh calon mempelai, atau oleh orang tua atau wakilnya."* Translation: Notification shall be made verbally or in writing by the prospective spouses or by their parents or representatives.

[109] Art. 5 of GR No. 9 of 1975. *"5. Pemberitahuan memuat nama, umur, agama/kepercayaan, pekerjaan, tempat kediaman calon mempelai dan apabila salah seorang atau keduanya pernah kawin, disebutkan juga nama istri atau suaminya terdahulu."* Translation: "5. Notification shall set out the name, age, religion/belief, occupation, residence of the prospective spouse and if one or both of them have ever married, name of the former wife or husband shall also be mentioned." See also Art. 6 of GR No. 9 of 1975.

parties, a marriage will only be held after the tenth day after such notification.[110] A marriage will be held according to the couple's religion before two witnesses.[111]

If according to examination, an officer is of the opinion that the couple cannot marry, the officer must inform the couple or their parents or guardians along with the reasons therefor.[112] Upon this objection, the couple may submit their appeal to the local district court. The judge will make his/her decision whether to affirm the objection or state otherwise. If the judge is of the opinion that the objection is invalid, the couple may once again process the announcement of their marriage notification.[113]

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[110] Art. 8 and Art. 9 of GR No. 9 of 1975. *"8. Setelah dipenuhinya tata cara dan syarat-syarat pemberitahuan serta tiada sesuatu halangan perkawinan Pegawai Pencatat menyelenggarakan pengumuman tentang pemberitahuan kehendak melangsungkan perkawinan dengan cara menempelkan surat pengumuman menurut formulir yang ditetapkan pada kantor Pencatatan Perkawinan pada suatu tempat yang sudah ditentukan dan mudah dibaca oleh umum. 9. Pengumuman ditandatangani oleh Pegawai Pencatat dan memuat: (a) Nama, umur, agama/kepercayaan, pekerjaan, tempat kediaman dari calon mempelai dan dari calon orang tua mempelai; apabila salah seorang atau keduanya pernah kawin disebutkan nama istri dan atau suami mereka terdahulu."* Translation: "8. After the procedures and conditions for notification are met and there is no obstacle to a marriage, a Registration Officer shall make an announcement of the notification of intention to hold a marriage by posting such announcement according to the designated form at the Marriage Registration office at a place which has been determined and readable by the public. 9. Announcement shall be signed by a Registration Officer and set out: (a) Name, age, religion/belief, occupation, residence of the prospective spouse and of parents of the prospective spouse; if one or both of them have ever married, name of their former wife or husband shall be mentioned."

[111] Art. 10 of GR No. 9 of 1975 "(1) *Perkawinan dilangsungkan setelah hari ke sepuluh sejak pengumuman kehendak perkawinan oleh Pegawai Pencatat seperti yang dimaksud dalam Pasal 8 Peraturan Pemerintah ini. (2) Tata cara perkawinan dilakukan menurut masing-masing agamanya dan kepercayaannya itu. (3) Dengan mengindahkan tata cara perkawinan menurut masing-masing hukum agamanya dan kepercayaannya itu, perkawinan dilaksanakan di hadapan Pegawai Pencatat dan dihadiri oleh dua orang saksi.*" Translation: "(1) A marriage shall be held on the tenth day as of the announcement of marriage intention by a Registration Officer as referred to in Article 8 of this Government Regulation. (2) Procedure for a marriage shall be implemented according to each of their religion and belief. (3) By considering procedure for a marriage according to each of the law of their religion and belief, a marriage shall be held before a Registration Officer and in the presence of two witnesses."

[112] Art. 7(2) of GR No. 9 of 1975. *"Apabila ternyata dari hasil penelitian terdapat halangan perkawinan sebagaimana dimaksud Undang-undang dan atau belum dipenuhinya persyaratan tersebut dalam Pasal 6 ayat(2) Peraturan Pemerintah ini, keadaan itu segera diberitahukan kepada calon mempelai atau kepada orang tua atau kepada wakilnya."* Translation: If it is evident from the results of examination that there is an obstacle to a marriage as referred to in Law and or non-fulfilment of requirements referred to in Art. 6 para (2) of this Government Regulation, such condition shall be promptly notified to the prospective spouse or to their parents or representative.

[113] Art. 21 of MA 1974. *"(1) Jika pegawai pencatat perkawinan berpendapat bahwa perkawinan tersebut ada larangan menurut undang-undang ini, maka ia akan menolak melangsungkan perkawinan. (2) Dalam hal penolakan, maka permintaan salah satu pihak yang ingin melangsungkan perkawinan oleh pegawai pencatat perkawinan akan diberikan suatu surat keterangan tertulis dari penolakan tersebut disertai dengan alasan-alasan penolakannya. (3) Para pihak yang perkawinannya ditolak berhak mengajukan permohonan kepada pengadilan di dalam wilayah mana pegawai pencatat perkawinan yang mengadakan penolakan berkedudukan untuk memberikan keputusan, dengan menyerahkan surat keterangan penolakan tersebut di atas. (4) Pengadilan akan memeriksa perkaranya dengan acara singkat dan akan memberikan ketetapan, apakah ia akan*

After a marriage is solemnized according to their religion, the couple have to sign a Marriage Certificate which will be co-signed by witnesses and officer of the Registration Office. If they marry according to the Islamic Law, it will also be signed by their parent(s)/father or guardian. Signing of a Marriage Certificate concludes the marriage, therefore it is validly established and registered.[114]

The couple must attend the matrimony ceremony and sign the marriage certificate in person. A power of attorney is only allowed for a very important reason and can only be presented if it is authentic or is privately executed and legalized by the officer of a Registration Office.[115] After the signing of a marriage certificate, registration is completed. One copy of the marriage certificate is given to the relevant couple, which sets out important information, for instance name, place and date birth, religion, occupation and domicile of the couple.[116]

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menguatkan penolakan tersebut ataukah memerintahkan agar supaya perkawinan dilangsungkan. (5) Ketetapan ini hilang kekuatannya, jika rintangan-rintangan yang mengakibatkan penolakan tersebut hilang dan para pihak yang ingin kawin dapat mengulangi pemberitahuan tentang maksud mereka." Translation: (1) If a marriage registration officer is of the opinion that there is prohibition of marriage according to this law, he/she shall refuse to hold the marriage. (2) In case of refusal, with respect to the request of one of the parties who intend to hold a marriage, a marriage registration officer shall give a written information on the refusal along with the reasons for refusal. (3) Parties whose marriage is refused shall be entitled to submit a petition to a court of the area in which the marriage registration officer making the refusal is domiciled to give a decision, by delivering the above-mentioned information on refusal. (4) A Court shall examine the case by brief procedure and shall give a stipulation whether it will support the refusal or order the marriage to be held. (5) The stipulation shall lose its force if the obstacles causing such refusal are removed and the parties who intend to marry may repeat the notification of their intention.

[114] Art. 11 of GR 9 of 1975. "*(1) Sesaat sesudah dilangsungkannya perkawinan sesuai dengan ketentuan-ketentuan pasal 10 Peraturan Pemerintah ini, kedua mempelai menandatangani akta perkawinan yang telah disiapkan oleh Pegawai Pencatat berdasarkan ketentuan yang berlaku. (2) Akta perkawinan yang telah ditandatangani oleh mempelai itu, selanjutnya ditandatangani pula oleh kedua saksi dan Pegawai pencatat yang menghadiri perkawinan dan bagi yang melangsungkan perkawinan menurut agama Islam, ditandatangani pula oleh wali nikah atau yang mewakilinya. (3) Dengan penandatanganan akta perkawinan, maka perkawinan telah tercatat secara resmi."* Translation: "(1) Shortly after a marriage is held in accordance with the provisions of article 10 of this Government Regulation, both spouses shall sign a deed of marriage which has been prepared by a Registration Officer based on the prevailing provisions. (2) The deed of marriage signed by the spouses, shall be subsequently co-signed by the two witnesses and registration Officer who attend the marriage and for those who hold a marriage according to Islam, shall be co-signed by a marriage guardian or his/her representative. (3) By the signing of a deed of certificate, the marriage shall be officially registered."

[115] Art. 6 (h) of GR No. 9 of 1975. *"Surat Kuasa otentik atau di bawah tangan yang disahkan oleh Pegawai Pencatat, apabila salah seorang calon mempelai atau keduanya tidak dapat hadir sendiri karena sesuatu alasan yang penting, sehingga mewakilkan kepada orang lain."* Translation: "An authentic or privately drawn up power of attorney shall be legalized by a Registration Officer, in the event that one or both of the prospective spouses are unable to attend in person for an important reason, thus represented by another person."

[116] Art. 12 of GR No. 9 of 1975. *"Akta perkawinan memuat: (a) nama, tanggal dan tempat lahir, agama/kepercayaan, pekerjaan dan tempat kediaman suami-istri; Apabila salah seorang atau keduanya pernah kawin, disebutkan juga nama istri atau suaminya terdahulu; (b) Nama, agama/kepercayaan, pekerjaan dan tempat kediaman orang tua mereka; (c) Izin sebagaimana dimaksud dalam Pasal 6 ayat (2), (3), (4) dan 5 Undang-undang; (d) Dispensasi sebagai dimaksud dalam Pasal 7 ayat (2) Undang-undang; (e) Izin Pengadilan*

The marriage procedure according to BW is different from the procedure above. BW does not involve a holy matrimony ceremony according to the couple's religion, and it is not a point of marriage validation. Aside from such holy matrimony ceremony, the rest of the procedure is similar. BW states that before a marriage is held or takes place, a notification to a relevant Registry Office must be made. Based on such notification, an officer will make an announcement. The announcement will serve as the basis for any party to prevent the marriage. The prevention of marriage is possible for particular reasons which will be discussed in sub-chapter 2.4 below.

To prove that a couple meet all of the requirements, they have to submit several official documents to a Registration Office, among others the birth certificate, parents' approval and evidence that the bride and groom are single.[117] The Registration Office may refuse

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sebagaimana dimaksud dalam Pasal 4 Undang-undang; (f) Persetujuan sebagai dimaksud dalam Pasal 6 ayat (1) Undang-undang; (g) Izin dari Pejabat yang ditunjuk oleh Menteri HANKAM/PANGAB bagi anggota Angkatan Bersenjata; (h) Perjanjian perkawinan bila ada; (i) Nama, umur, agama/kepercayaan, pekerjaan dan tempat kediaman para saksi, dan wali nikah bagi yang beragama Islam; (j) Nama, umur, agama/kepercayaan, pekerjaan dan tempat kediaman kuasa apabila perkawinan dilakukan melalui seorang kuasa." Translation: "A deed of marriage shall set out: a. name, date and place of birth, religion/belief, occupation and residence of a husband-wife; If one or both of them have ever married, name of their former wife or husband shall also be mentioned; b. Name, religion/belief, occupation and residence of their parents; c. Permit as referred to in Article 6 paragraphs (2), (3), (4) and 5 of the Law; d. Dispensation as referred to in Article 7 paragraph (2) of the Law; (e) Judicial Permit as referred to in Article 4 of the Law; (f) Approval as referred to in Article 6 paragraph (1) of the Law; (g) Permit of the Official appointed by the Minister of Defense and Security/Commander of the Armed Forces of the Republic of Indonesia for a member of the Armed Forces; (h) Matrimonial Agreement if any; (i) Name, age, religion/belief, occupation and residence of witnesses, and marriage guardian for a Moslem couple; (j) Name, age, religion/belief, occupation and residence of proxy, if the marriage is held by a proxy."

[117] Art. 71 of BW. *"Sebelum melangsungkan perkawinan, Pegawai Catatan Sipil harus meminta agar kepadanya diperlihatkan: (1) akta kelahiran masing-masing calon suami istri; (2) akta yang dibuat oleh Pegawai Catatan Sipil dan didaftarkan dalam daftar izin kawin, atau akta otentik lain yang berisi izin bapak, ibu, kakek, nenek, wali atau wali pengawas, ataupun izin yang diperoleh dari Hakim, dalam hal-hal di mana izin itu diperlukan; izin itu juga dapat diberikan pada akta perkawinan sendiri; (3) dalam hal perkawinan kedua atau perkawinan berikutnya akta perkawinan suami istri yang dulu, atau akta perceraian, atau salinan surat ijin dari Hakim yang diberikan dalam hal pihak lain dan suami atau istri tidak ada; (4) akta yang menunjukkan adanya perantaraan Pengadilan Negeri; (5) akta kematian dari mereka yang seharusnya memberikan izin kawin; (6) bukti, bahwa pengumuman perkawinan itu telah berlangsung tanpa pencegahan di tempat yang disyaratkan menurut Pasal 52 dan berikutnya, ataupun bukti bahwa pencegahan yang dilakukan telah dihentikan; (7) dispensasi yang telah diberikan; (8) izin untuk para perwira dan tentara bawahan yang menjadi syarat untuk melakukan perkawinan."* Translation: "Before holding a marriage, a Vital Records Official must request presentation to him/her of the following: (1) deed of birth of each prospective husband and wife; (2) deed drawn up a Vital Records Official and registered in the marriage permit list, or other authentic deeds containing the permit of father, mother, grandfather, grandmother, guardian or supervising guardian, or permit obtained from a judge, in the event that those permits are required; the permits may be also be given to the deed of marriage itself; (3) in the event of the second or subsequent marriage, the deed of marriage of the previous spouse, or deed of divorce, or copy of permit given by a Judge in the absence of the former spouse; (4) deed indicating the existence of mediation with a District Court; (5) deed of death of those who should have given a marriage permit; (6) evidence that the announcement of marriage has been made without any prevention at the required place according to Article 52 and so on, or evidence that the prevention made has been stopped; (7) dispensation given; (8) permit for officers and privates which becomes a requirement for holding a marriage." In Dutch: *"Alvorens tot de voltrekking des huwelijks over te gaan, zal de ambtenaar van den burgerlijken stand zich doen ter hand stellen: (1) de geboorte-acte van ieder der aanstaande echgenooten; (2) eene acte, door eenen*

to hold a marriage if the required documents are not complete. If the officer refuses to register the marriage, the respective couple may request the district court to consider whether or not the documents have been completed. [118]

A groom, bride and two witnesses must attend in person when a marriage is held.[119] Any exception to this requirement can only happen for an extraordinary occasion. When it happens, the groom or bride may be represented based on an authentic power of attorney and upon the approval of the Minister of Justice.[120]

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ambtenaar van den burgerlijken stand opgemaakt en in het register van toestemming tot het huwelijk ingeschreven of eene andere authentieke acte, houdende de toestemming van den vader, de moeder, den grootvader of de grootmoeder, den voogd en den toezienden voogd, of wel het bij den regter verkregen verlof, in de gevalen waarin hetzelve vereischt wordt de toestemming kan ook bij de huwelijk-acte zelve worden gegeven; (3) de acte waaruit blijkt van de tusschenkomst van de raad van justitie, in de gevallen waarin die vereischt wordt; (4) in geval van de tweede of volgen huwelijk, de acte van overlijden van den vorigen echtgenoot, of de acte van echtscheiding, of wel afschrift van het verlof van de regter, bij afwezigheid van den anderen echtgenoot verleend; (5) de acte van overlijden van alle de zoodanigen die hunne toestemming tot het huwelijk zouden hebben moeten geven; (6) het bewijs dat de huwelijksafkondiging zonder stuiting is afgeloopen ter plaatse alwaar die afkondiging overeenkostig de art. 52 en volgende van dezen titel, vereischt wordt, of weld at eene gedane stuiting is opgeven; (7) de verleende dispensation; (8) de toestemming voor officieren en militairen van minderen rang tot het aangaan van een huwelijk vereischt.

[118] Art. 74 of BW. "*Jika pegawai catatan sipil menolak melangsungkan suatu perkawinan berdasar atas kurang lengkapnya surat-surat dan keterangan-keterangan yang diharuskan oleh pasal-pasal yang lalu, maka pihak-pihak yang berkepentingan berhak memajukan surat permintaan kepada Pengadilan negeri, yang mana, setelah mendengar Jawatan Kejaksaan, sekiranya ada alasan untuk itu, dan mendengar pula akan pegawai Catatan Sipil, secara singkat dan tanpa kemungkinan banding, akan mengambil putusannya tentang sudah atau belum lengkapnya surat-surat itu.*" Translation: "In the event that a vital records official refuses to hold a marriage based on the incompleteness of documents and statements required by the previous articles, the interested parties shall be entitled to submit a petition to a district Court, which, after hearing the public prosecutor, briefly and without any opportunity for an appeal, shall make a decision on the completeness or incompleteness of those documents." In Dutch: "*Indien de ambtenaar van den burgerlijken stand weigert om een huwelijk te voltrekken, op grond van de ongenoegzaamheid der stukken en verklaringen, bij de vorige art. gevorderd, zullen de partijn de bevoegdheid hebben zich bij verzoekschrift tot den raad van justitie te keeren; welke raad, na verhoor van het openbaar ministerie, mitsgaders wanneer daartoe gronden zijn, van den ambtenaar van den burgerlijken stand, summier en zonder hooger beroep, over de genoegzaamheid of ongenoegzaamheid der stukken zal uitspraak doen.*"

[119] Art. 78 of BW: "*Untuk melangsungkan perkawinan, kedua calon suami istri harus menghadap sendiri di muka pegawai catatan sipil.*" Translation: "To hold a marriage, both prospective spouses must appear in person before a vital records official." In Dutch: "De aanstaande echtgenooten zijn verplict bij voltrekking van hun huwelijk in persoon voor den ambtenaar van den burtgerlijken stand te verschijnen."

[120] Art. 79 of BW: *Jika ada alasan yang penting, Presiden berkuasa memberi izin kepada pihak-pihak yang berkepentingan, melangsungkan perkawinan mereka dengan seorang wakil yang dengan akta otentik teristimewa dikuasakan untuk itu. Jika sebelum perkawinan dilangsungkan, orang yang memberi kuasa itu dengan sah kiranya telah kawin dengan orang lain, maka perkawinan yang berlangsung dengan wakil istimewa itu, dianggap sebagai tidak pernah berlangsung.* Translation: "If there is an important reason, the President shall be authorized to give a permit to the interested parties, to hold their marriage by a proxy who is authorized by a specific authentic power of attorney. If before the holding of such marriage, the person lawfully giving such power of attorney has married with another person, the marriage held by such specific proxy shall be deemed to have never been held." In Dutch: "*Het zal aan den Gouverneur-general vrijstaan om, uit hoofde van gewigtige redenen, aan partijen te vergunnen het huwelijk door eenen bijzonderen bij authentieke acte gevolmachtigde te*

A power of attorney for marriage stipulation is drawn up to accommodate the tradition in the Netherlands at that moment, the so-called "marrying by the gloves" or "*trouwen met de handschoen*".[121] This tradition allows many eligible young men, after finishing their education in the Netherlands, to depart from the father land for a job or to accept a position in the colonial service. Meanwhile, his friend helps him in marrying his wife-to-be in the father land by a power of attorney and soiled left-hand glove before a local Vital Records Office, before the wife departs and leaves the father land to follow her husband. This marriage is binding as if the bridegroom is present. If either party in a glove marriage passes away before meeting, the survivor will share their assets, as their marriage is considered valid and legitimate. Although this custom is unfamiliar in Indonesia, yet the stipulation of the power of attorney for a marriage is maintained in Art. 6(2) of GR No. 9 of 1974.[122]

2.3.2.1 Marriage Registration of the Believers of Kepercayaan Kepada Tuhan Yang Maha Esa *(Faith in the Almighty God)*

There are some well-known sects in Indonesia, among others *Samin*, *Sunda Wiwitan* in Kanekes, Lebak Banten, *Sunda Wiwitan* mahzab Madrais known as *Cigugur* in Kuningan, West Java, *Buhin* in West Java, *Kejawen* in Central and East Java, *Parmalim* in Batak, North Sumatera, *Kaharingan* in Kalimantan, *Tonaas Walian* in Minahasa, North Sulawesi, *Tolottang* in South Sulawesi, *Aluk Todolo* in Tana Toraja, *Wetu Telu* in Lombok, *Naurus* in Seram Island, Maluku.[123] These sects are known as the believers of *Kepercayaan Kepada Tuhan Yang Maha Esa* (Faith in the Almighty God).

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mogen voltrokken. Indien de lastgever, voor dat het huwelijk voltrokken is, wettiglijk met eenen anderen persoon mogt zijn in den echt getreden, zal het huwelijk, bij eenen gevolmagtigde voltrokken, als niet gescheid beschouwd worden."

[121] This culture of "trouwen met de handschoen" or marrying with the gloves can be found in several biographies and sociology articles about Batavia (now, Jakarta) or the Netherlands Indischë (now, Indonesia), among others, Jean Gelman Taylor, *The Social World of Batavia, European and Eurasian in Dutch Asia,* (Wisconsin: The University of Wisconsin Press, 1983); Greddy Huisman, *Trouwen Met de Handschoen, Een Huwelijk in Nederlands-Indië omstreek 1890,* (Groningen: 2008); E.M. Beekma, *Paradijzen van Weleer, Koloniale Literatuur uit Nederland Indië 1600-1950* (Amsterdam: Prometheus, 2006). See also Javapost, *Gehuwd Per Volmacht* available at https://javapost.nl/2013/02/08/gehuwd-per-volmacht/, last accessed on 26 May 2018.

[122] Art. 6 (2) point (h) of GR No. 9 of 1975. *"(h) Surat kuasa otentik atau bawah tangan yang disahkan oleh Pegawai Pencatat, apabila salah seorang calon mempelai atau keduanya tidak dapat hadir karena sesuatu alasan yang penting sehingga mewakilkan kepada orang lain."* Translation: (h) An authentic or privately drawn up power of attorney shall be legalized by a Registration Officer, in the event that one or both of the prospective spouses are unable to attend in person for an important reason thus represented by another person.

[123] Kompas.com, *Ada 187 Kelompok Penghayat Kepercayaan Yang Terdaftar di Pemerintah (There are 187 Believer Groups Registered with the Government),* available at https://nasional.kompas.com/read/2017/11/09/12190141/ada-187-kelompok-penghayat-kepercayaan-yang-terdaftar-di-pemerintah , last accessed 23 March 2018.

Faith in the Almighty God has a particular position in Indonesia. It is considered as a culture, particularly a spiritual culture, which grows and lives within the Indonesian society. Therefore, development of the same is monitored by the Department Education and Culture of the Republic of Indonesia, instead of the Department of Religious Affairs.

Faith in the Almighty God has been discussed since the 1950s with various terminologies, among others mysticism (*kebatinan*), faith (*kepercayaan*), and *kejawen*. Such discussion before the Parliament or court constituted the believers' effort to have their faith recognized and acknowledged by the State. The results of such effort are written in the legal documentation, TAP MPR which determines the Guidelines of State Policy (*Garis-garis Besar Haluan Negara*).[124] It mentions that Faith in the Almighty God *(Kepercayaan terhadap Tuhan Yang Maha Esa)* is recognized and mentioned side by side or after religions. This document confirms the constitutional rights of Indonesian citizen to confess and profess their faith, as mentioned in the Indonesian Constitution.[125] Regardless of whether or not the religion and faith in the Almighty God is equivalent, Faith in the Almighty God is recognized and acknowledged in Indonesia.

Believers of Faith in the Almighty God used to have an inconvenient status with their marriage, as it could not be registered neither with a Civil Registration Office nor Religious Affairs Office. The cases of Gumirat Darna Alam-Susilawati and Asep Setia Pujanegara-Rela Susanti are well-known cases for this problem.[126] The Civil Registration Office argued that a marriage can only be registered if the marriage is held according to religions acknowledged in Indonesia.

Nowadays, believers of Faith in the Almighty God are able to register their marriage according to the Civil Administration Law and its implementing regulation,

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[124] Guidelines of State Policy or *Garis-garis Besar Haluan Negara ("GBHN")*, issued by the Indonesian Parliament every five years and guideline of state development. Since the third amendment to the Indonesian Constitution in 2001, GBHN is replaced by the National Development Programme (*Program Pembangunan Nasional*) determined by the President of the Republic of Indonesia. Faith in the Almighty God is stated among others in TAP MPR of 1973, 1978, 1983, 1988, 1993, 1998.

[125] Art. 29 (2) of the Indonesian Constitution. *"(2) Negara menjamin kemerdekaan tiap-tiap penduduk untuk memeluk agamanya masing-masing dan untuk beribadat menurut kepercayaannya itu."* Translation: "(2) The state shall guarantee freedom to every resident to adhere to his/her religion and to worship in accordance with such religion and belief."

[126] Decision of the Supreme Court No. 370/K/TUN/2003 dated March 28, 2006. Gumirat Darna Alam-Susilawati case or known by "Gugum-Susi" case. Their marriage was held according to their Faith in the Almighty God in line with the Sundanese *Adat* Law. In 1996, Gugum made a claim against the Civil Registration Office before the State Administrative Court to have his marriage registered. His claim was refused. The result is different in Asep-Rela case. In 2002, Asep-Rela made a claim against the Civil Registration Office of Bandung before the State Administrative Court. The case was appealed before the Supreme Court which confirmed the previous judicial decision and order the Civil Registration Office to register the marriage of Asep and Rela. One of the considerations of the Supreme Court is the fact that such Civil Registration Office has actually made several marriage registrations held according to Faith in the Almighty God.

Government Regulation No. 37 of 2007 regarding the Implementation of Law No. 23 of 2006 regarding Civil Administration, hereinafter referred to as the "**GR No. 37 of 2007**").[127] Based on these regulations, a Vital Records Office is obligated to provide registration services for any legal events of believers of Faith in the Almighty God, among others marriage registration.[128] The provisions on marriage registration are set forth in Chapter X Art. 81-83 of GR No. 37 of 2007.

A marriage of believers of Faith in the Almighty God must be held before their elders.[129] Elders are persons elected to be organizational leaders. Based on such matrimonial ceremony, respective elders will complete and sign a marriage certificate. Based on such certificate, elders report such marriage to a Civil Registration Office within 60 days, at the latest. Such report must be attached with several legal documents, among others identity card of the couple.[130] After the verification of data at the Civil Registration Office, a marriage certificate will be issued and given to the respective couple.[131]

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[127] Law No. 23 of 2006 regarding Civil Administration State Gazette No. 124 of 2006, Supplement No. 4674, as amended to date; Government Regulation No. 37 of 2007 regarding the Implementation of Law No. 23 of 2006 regarding Civil Administration, State Gazette No. 80 of 2007, Supplement No. 4736, as amended to date. Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism *(Peraturan Bersama Menteri Dalam Negeri dan Menteri Kebudayaan dan Pariwisata)* No. 43/41 of 2009 regarding Guideline on Services to Believers of Faith in the Almighty God *(Pedoman Pelayanan kepada Penghayat Kepercayaan Terhadap Tuhan Yang Maha Esa)*, dated September 16, 2009.

[128] Art. 32 (2) of GR No. 37 of 2007. "*(2) Pelayanan pencatatan sipil sebagaimana dimaksud pada ayat (1), meliputi: … d. perkawinan; …"* Translation: "(2) Civil registration services as referred to in paragraph (1), shall include: … d. marriage; ..."

[129] Art. 81 (1), (2) of GR No. 37 of 2007. "*(1) Perkawinan Penghayat Kepercayaan dilakukan di hadapan Pemuka Penghayat Kepercayaan. (2) Pemuka Penghayat Kepercayaan ini merupakan seseorang yang ditunjuk dan ditetapkan sebagai pembina oleh organisasi penghayat kepercayaan, untuk mengisi dan menandatangani surat perkawinan Penghayat Kepercayaan.*" Translation: "(1) A marriage of Believers shall be held before a Leader of Believers. (2) This Leader of Believers shall be a person appointed and designated as a counsel by the believer organization, to fill out and sign a marriage certificate of Believers."

[130] Art. 82 of GR No. 37 of 2007. *"Peristiwa perkawinan sebagaimana dimaksud dalam Pasal 81 ayat (2) wajib dilaporkan kepada Instansi Pelaksana atau UPTD Instansi Pelaksana paling lambat 60 (enam puluh) hari dengan menyerahkan: (a) surat perkawinan Penghayat Kepercayaan; (b) fotokopi KTP; (c) pas foto suami dan istri; (d) akta kelahiran; dan (e) paspor suami dan/atau istri bagi orang asing."* Translation: "A marriage event as referred to in Article 81 paragraph (2) must be reported to the Implementation Agency or UPTD of the Implementation Agency by no later than 60 (sixty) days by delivering: (a) marriage certificate of Believers; (b) copy of Identity Card; (c) photograph of the husband and wife; (d) deed of birth; and (e) passport of the husband and/or wife for foreigners."

[131] Art. 83 of GR No. 37 of 2007. *"(1) Pejabat Instansi Pelaksana atau UPTD Instansi Pelaksana mencatat perkawinan sebagaimana dimaksud dalam Pasal 82 dengan tata cara: (a) menyerahkan formulir pencatatan perkawinan kepada pasangan suami istri; (b) melakukan verifikasi dan validasi terhadap data yang tercantum dalam formulir pencatatan perkawinan; dan (c) mencatat pada register akta perkawinan dan menerbitkan akta perkawinan Penghayat Kepercayaan. (2) Kutipan perkawinan sebagaimana dimaksud pada ayat (1) huruf c diberikan kepada masing-masing suami istri."* Translation: "(1) An Implementing Agency Official or UPTD of the Implementing Agency shall register the marriage as referred to in Article 82 by the following procedure: (a)

By the process above, a minor problem still remains: what if believers have no such organization and it is not registered with the Department of Education and Culture? Such believers will be in a position where they are unable to register their marriage. In that case, the author believes that Art. 35 of the Civil Administration Law could serve as a legal ground to have their marriage registered. The respective couple can request a district court's decision to order a Civil Registration Office to register their marriage.[132]

2.3.2.2 Validity of Marriage: Religion's Law or Registration

The Art. 2 of MA 1974 mentions that a valid marriage must be held according to the couple' religion and then, must be followed by registration with a local civil registration office. GR No. 9 of 1975 as the implementing regulation of MA 1974, stipulates that the existence of marriage shall only be proven by a Marriage Book (*Buku Nikah*) or Marriage Certificate issued by an authorized registration office, as relevant.[133] The same regulation also mentions that marriage registration is about an administrative purpose, instead of validity requirement. GR No. 9 of 1975 mentions that any negligence from such registration will cause a fine to the respective couple, and the Civil Administration Law mentions that the fine amounts to one million IDR.[134]

The provisions above lead to two opinions. First, marriage registration is only for an administrative purpose instead of validity requirement. The other opinion states that registration is one of the validity requirements. Both conclusions have their own arguments and encouragement.

Before MA 1974, marriage registration is stipulated in Law No. 22 of 1946 regarding the Registration of Marriage, Divorce and Reconciliation.[135] Such law mentions that

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delivering the form of marriage registration to a husband and wife; (b) conducting verification and validation of the data set out in the form of marriage registration; and (c) making registration in a marriage deed register and issuing a deed of marriage of Believers. (2) The excerpt of marriage as referred to in paragraph (1) sub-paragraph c shall be given to each husband and wife."

[132] Art. 35 of Civil Administration Law. *"35. Pencatatan Perkawinan sebagaimana dimaksud dalam Pasal 34 berlaku pula bagi: (a) perkawinan yang ditetapkan oleh Pengadilan; dan (b) perkawinan Warga Negara Asing yang dilakukan di Indonesia atas permintaan Warga Negara Asing tersebut."* Translation: "The Marriage Registration as referred to in Article 34 shall also apply to: (a) a marriage stipulated by a Court; and (b) a marriage between Foreigners held in Indonesia upon request of the Foreigners."

[133] GR No. 9 of 1975, Art. 5-7 of the Compilation of Islamic Laws and Art. 34-37 of the Civil Administration Law.

[134] Art. 90 (2) of Law No. 23 of 2006. *"(2) Denda administratif sebagaimana dimaksud pada ayat (1) paling banyak Rp.1.000.000,00. (satu juta Rupiah)"* Translation: "(2) The administrative fine as referred to in paragraph (1) shall be at maximum of Rp.1,000,000 (one million Rupiah)."

[135] Law No. 22 of 1946 regarding the Registration of Marriage, Divorce and Reconciliation in Java and Madura Areas, *jo*. Law No. 32 of 1954 regarding the Establishment of Law dated November 21, 1946 No. 22 of

marriage registration is aimed at ensuring legal certainty and order (*ketertiban*).[136] Any violence of marriage registration does not impact any marriage nullification, yet it imposes a fine in a certain amount.[137] This history influences and supports the conclusion that registration is an administrative purpose only.

As an administrative requirement, such provision assists some couples who fail to register their marriage. Amongst them is the couple Partini and Sartono,[138] whose marriage was stated validly established by the judge, since it was held in front of a priest according to a Catholic holy matrimony and both of them had good intention to have a good marriage. Their negligence in making marriage registration was declared as a legal fault and they were subject to fine of IDR7,500. The judge confirmed that the marriage of Partini and Sartono was valid even though it was not registered. Therefore, their two children were confirmed as their legal children and entitled to inheritance from the late Sartono. The author notes that good intention of the respective couple is a predominant consideration of the judge. Their failure is not an intention to avoid any provisions of MA 1974.[139]

1946 regarding the Registration of Marriage, Divorce and Reconciliation in all areas outside Java and Madura, dated October 26, 1954, State Gazette No. 98 of 1954.

[136] Official Elucidation of Art. 1 of Law No. 22 of 1946. *"Maksud pasal ini ialah agar nikah, talak dan rujuk menurut agama Islam dicatat agar mendapat kepastian hukum. Dalam negara yang teratur segala hal-hal yang bersangkut paut dengan penduduk harus dicatat, sebagai kelahiran, pernikahan, kematian dan sebagainya. Lagi pula perkawinan bergandengan rapat dengan waris-mal-waris sehingga perkawinan perlu dicatat menjaga jangan sampai ada kekacauan. … Ancaman dengan denda sebagai tersebut pada ayat (1) dan (3) pasal 3 Undang-undang ini bermaksud supaya aturan administrasi ini diperhatikan: akibatnya sekali-kali bukan, bahwa nikah, talak, rujuk itu menjadi batal karena pelanggaran itu."*

[137] Art. 1 (1) of Law No. 22 of 1946 *"Nikah yang dilakukan menurut agama Islam selanjutnya disebut nikah, diawasi oleh Pegawai Pencatatan Nikah yang diangkat oleh Menteri Agama atau oleh pegawai yang ditunjuk olehnya. Talak dan rujuk yang dilakukan menurut agama Islam, selanjutnya disebut talak dan rujuk diberitahukan kepada pegawai pencatatan nikah."* Art. 3 (1) of Law No. 22 of 1946 *"Barang siapa yang melakukan akad nikah atau nikah dengan seorang perempuan tidak di bawah pengawasan pegawai yang dimaksudkan pada ayat 2 pasal 1 atau wakilnya, dihukum sebanyak-banyaknya Rp.50,- (lima puluh rupiah.)"*

[138] Moegono, *Hukum dan Moral,* Varia Advokat Vol.1 April 2008, pp. 20-22, is also available at *variaadvokat.awardspace.info/vol1/opiniapril.pdf, last accessed 26 May 2018*. *Partini and Sartono married in a Catholic church according to their religion in Pati Sub-district. After their marriage, they came back to Jakarta without making any marriage registration as they should. The period of their marriage was thirty years and they had two children. After Partono passed away, his brother claimed the inheritance left by Partono. His brother claimed that he was the legal heir of Partono. The marriage between Partini and Sartono was not registered in a Civil Registration Office, therefore it was invalid and furthermore, their children only have a legal relationship with their mother. The case was adjudicated by a well-known Judge Bismar Siregar who afterward refused such claim and considered and confirmed that the marriage of Partini and Sartono was valid and legal although it was not registered.*

[139] The Compilation of Islamic Laws states that a marriage book is the ultimate evidence of a valid marriage, as described in Art. 6 (2) of the Compilation of Islamic laws. *"Perkawinan yang dilakukan di luar pengawasan Pegawai Pencatat Nikah tidak mempunyai kekuatan hukum."* Translation: "A marriage which is held without the supervision of a Marriage Registration Officer shall have no legal power." In the event that a

In relation to marriage registration, the Civil Administration Law stipulates that it must be made within sixty (60) days after a marriage.[140] In the event a couple has no evidence of their marriage, marriage registration will be made after the respective couple obtain a district court's decision.[141] The couple is given a chance to make their marriage registration, yet their failure in registering within the designated period will be subject to a fine in the amount of one million Indonesian Rupiah.[142]

In this matter, the author notices that registration also constitutes the soul and essence of MA 1974. Marriage registration is mandatory after holy matrimony is held. Without marriage registration, the provisions of marriage prevention or marriage cancellation as stipulated in Chapter III or IV will not be executed, as well as the polygamy provision or child marriage.[143] The left out public notification makes any parties who have an interest or objection to a marriage unable to submit any objection before the marriage. Moreover, Art. 10 (3) of GR No. 9 of 1975 states that besides the holy matrimony according the couple's religion, a marriage must be held before a registry office's officer and witnesses. Therefore, registration cannot be considered merely as an administrative purpose. It also has protection for any third parties.

Therefore, the author is of the opinion that marriage registration should be a validity requirement rather than an administrative requirement. It suffices to remark the thought of Quraish Shihab, one of well-known Moslem scholars in Indonesia. Islamic scholars agree that a marriage in secrecy is forbidden. A marriage without any registration or *siri* marriage in Indonesian context can cause iniquity towards the performers. In this case,

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couple fail to present a Marriage Book, their marriage shall be considered to have no legal consequence. On the other hand, pursuant to the Civil Administration Law, such failure in registration shall be subject to a fine in a particular amount.

[140] Art. 34 (1) of the Civil Administration Law. *"Perkawinan yang sah menurut peraturan perundang-undangan wajib dilaporkan oleh Penduduk kepada Instansi Pelaksana di tempat terjadinya perkawinan paling lambat 60 (enam puluh) hari sejak tanggal perkawinan."* Translation: A legal marriage according to laws and regulations must be reported by Citizens to the Implementing Agency at the place of marriage by no later than 60 (sixty) days as of the date of marriage.

[141] Art. 36 of Civil Administration Law. *"Dalam hal perkawinan tidak dapat dibuktikan dengan Akta Perkawinan, pencatatan perkawinan dilakukan setelah adanya penetapan Pengadilan."* Translation: In the event that a marriage cannot be proven by a Deed of Marriage, marriage registration shall be made after a judicial decision.

[142] Art. 90 (1) sub-article (b) *jo*. (2) of the Civil Administration Law. *"(1) Setiap penduduk dikenai sanksi administratif berupa denda melampaui batas waktu pelaporan Peristiwa Penting dalam hal: … (b) perkawinan sebagaimana dimaksud dalam Pasal 34 ayat (1) atau Pasal 37 ayat (4); …. (2) Denda administratif sebagaimana dimaksud pada ayat (1) paling banyak Rp.1,000,000,- (satu juta Rupiah)."* Translation: (1) Each citizen shall be subject to an administrative sanction of fine for exceeding the deadline for reporting of Important Event in the event of: … (b) marriage as referred to in Art. 34 paragraph (1) or Art. 37 paragraph (4); …. (2) The administration sanction as referred to in paragraph (1) shall be at maximum of Rp. 1,000,000 (one million Rupiah).

[143] Wahtono Darmabrata, *Op.Cit.,* pp. 42-54.

the respective couple contradict the provisions established by the government. The Quran commands people to obey the government provided that it is in line with the Quran. In this matter, marriage registration is not only in line with the Quran, but also it is also in line with the spirit of the Quran. The function of marriage registration is consistent with the function of two witnesses in Moslem holy matrimony. Marriage registration and witnesses constitute the proof or evidence or testimony of the existence of transaction in the future, and then, ensure the rights and obligations arising from the legal relationship, in this case, the marriage.[144]

2.4 Prevention and Cancellation of Marriage

2.4.1 Prevention of Marriage

Prevention of marriage *(aftuiting)* provided in MA 1974 is basically adopted from BW. Those stipulations have a lot in common. Marriage prevention in MA 1974 is stipulated in Chapter II, Art. 13-21. In the event that one of the couples does not meet marriage requirements, a marriage may be prevented.[145]

MA 1974 and BW stipulate certain parties who have the right to prevent a marriage. MA 1974 stipulates that parties who may submit such prevention are the existing husband or wife of one of the couple,[146] family members in a direct ascending or descending lineage, siblings, *wali nikah* (a person who, under the Islamic Law, is legally responsible for the bride), guardians, receiver of one of the couple, and any interested parties.[147] Meanwhile in BW, parties who are entitled to submit a marriage prevention

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[144] Khoiruddin Nasution, *Status Wanita di Asia Tenggara: Studi Terhadap Perundang-undangan Perkawinan Muslim Kontemporer di Indonesia dan Malaysia* (translation of the author: Women's Status in the Southeast Asia: Study on the Contemporary Moslem Marriage Laws and Regulations in Indonesia and Malaysia), (Jakarta: INIS, 2002), pp. 166-167.

[145] Art. 13 of MA 1974. *"Perkawinan dapat dicegah, apabila ada pihak yang tidak memenuhi syarat-syarat untuk melangsungkan perkawinan." Translation: A marriage may be prevented, in the event that there is a party who does not meet the requirements for a marriage.*

[146] Art. 15 of MA 1974. *"Barang siapa karena perkawinan dirinya masih terikat dengan salah satu dari kedua belah pihak dan atas dasar masih adanya perkawinan, dapat mencegah perkawinan yang baru, dengan tidak mengurangi ketentuan pasal 3 ayat 3 dan pasal 4 Undang-undang ini."* Translation: Any person, due to a marriage he/she is still bound by one of both parties and based on the existence of marriage, may prevent a new marriage, without prejudice to the provisions of article 3 paragraph 3 and article 4 of this Law.

[147] Art. 14 of MA 1974. *"(1) Yang dapat mencegah perkawinan ialah para keluarga dalam garis keturunan lurus ke atas dan ke bawah, saudara, wali nikah, wali, pengampu dari salah seorang calon mempelai dan pihak-pihak yang berkepentingan. (2) Mereka yang tersebut pada ayat (1) pasal ini berhak juga mencegah berlangsungnya perkawinan apabila salah seorang dari calon mempelai berada di bawah pengampuan, sehingga dengan perkawinan tersebut nyata-nyata mengakibatkan kesengsaraan bagi calon mempelai yang lainnya, yang mempunyai hubungan dengan orang-orang seperti tersebut dalam ayat (1) pasal ini."* Translation: "(1) Those who are able to prevent a marriage shall be family members in a direct ascending or descending lineage, siblings, marriage guardian, guardian, guardian (*pengampu*) of either prospective spouse and the interested parties. (2)

are better detailed. These parties are the respective husband or wife of the couple and their children,[148] including parents of the respective couple.[149] In the absence of parents, grandfather or grandmother or guardians have this right for certain reasons.[150] In the

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Those who are referred to in paragraph (1) of this article shall also be entitled to prevent the holding of a marriage if one of the prospective spouse is placed under guardianship, therefore the marriage obviously cause misery to the other prospective spouse, who has a relationship with the persons as referred to in paragraph (1) of this article."

[148] Art. 60 of BW. *"60. Barangsiapa karena perkawinan masihlah terikat dirinya dengan salah satu dari kedua belah pihak, seperti pun sekalian anak dilahirkan dari perkawinan itu, semua itu berhak mencegah perkawinan baru yang akan dilangsungkan, akan tetapi hanyalah berdasar atas telah adanya perkawinan yang lama."* Translation*:* "60. Any person due to a marriage is still bound with one of both parties, although children have been born out of such marriage, all of them shall be entitled to prevent a new marriage to be held, but only based on the existence of the previous marriage." In Dutch: "60. *Degene, die met eene der partijen door het huwelijk alsnog verboden is, mitsgaders de kinderen uit dat huwelijk voortgesproten, zijn bevoegd om het nieuw aan te gaan huwelijk te sluiten, doch alleenlijk op grond van het bestaande.*"

[149] Art. 61 of BW. *"Bapak dan ibu dapat mencegah perkawinan dalam hal-hal (1) bila anak mereka yang masih di bawah umur, belum mendapat izin; (2) bila anak mereka, yang sudah dewasa tetapi belum genap tiga puluh tahun, lali meminta izin mereka, dan dalam hal permohonan izin itu ditolak, lalai untuk meminta perantaraan Pengadilan Negeri seperti yang diwajibkan menurut Pasal 42; (3) bila salah satu pihak, yang karena cacat mental berada dalam pengampuan, atau dengan alasan yang sama telah dimohonkan pengampuan, tetapi atas permohonan itu belum diambil keputusan; (4) bila salah satu pihak tidak memenuhi syarat-syarat untuk mengadakan perkawinan dengan ketentuan-ketentuan bagian pertama bab ini; (5) bila pengumuman perkawinan yang menjadi syarat tidak diadakan; (6) bila salah satu pihak, karena sifat pemboros ditaruh di bawah pengampuan, dan perkawinan yang hendak dilangsungkan tampaknya akan membawa ketidakbahagiaan bagi anak mereka. Bila yang menjalankan perwalian atas anak itu orang lain dari bapak atau ibunya, maka wali atau wali pengawasnya, bila yang disebut terakhir ini harus mengganti si wali, mempunyai hak yang sama dalam hal-hal tersebut pada nomor 1, 3, 4, 5 dan 6."* Translation: A father and mother may prevent a marriage in the following events: (1) if their child who is still a minor, has not obtained a permit; (2) if their child, who is an adult but has not reached the age of thirty years old, and then asks their permit, and if the application for permit is refused, fails to seek mediation of a District Court as required according to Article 42; (3) if one of the parties, which due to mental incapacity is placed under guardianship, or for whom due to the same reason guardianship has been requested, but the request has not been decided on; (4) if one of the parties does not meet the requirements to hold a marriage in accordance with the provisions of the first section of this chapter; (5) if the required announcement of marriage has not been made; (6) if one of the parties, due to spending behavior is placed under guardianship, and the marriage which intends to be held will apparently bring unhappiness for their children. If the person who holds the guardianship of the child is other than his/her father or mother, his/her guardian or supervising guardian, if the latter must replace the guardian, shall have the same right in the matters referred to in sub-articles 1, 3, 4, 5 and 6. In Dutch: *"De vader of de moeder kan het huwelijk stuiten in de volgende gevallen: (1) wanneer hun kind, nog minderjarig zijnde, de vereischte toestemming niet bekomen heft; (2) wanneer hur meerderjarig kind, den vollen ouderdom van dertig Jaren niet hebben de bereikt, verzuimd heft hunne toestemming, en, bij weigering daarvan, de tusschenkomst van raad van justitie te verzoeken, welke volgens art,42 vereischt wordt; (3) wanneer eene der partijen uit hoofed van gebrek aan verstandelijk vermogens onder curateele gesteld, of de curateele uit dien hoofde verzocht, en op dat verzoek nog niet is beslist; (4) wanneer eene der partijen de vereischten niet bezit om overeenkomstig de bepalingen van de eerste afdeeling van dezen titel een huwelijk te kunnen aangaan; (5) wanneer de vereischte huwelijkafkondiging geen plaats heft gehad; (6) wanneer eene der partijen uit hoofed van werkwisting onder curateele is gesteld, en het voorgenomen huwelijk blijkbaar het ongeluk van hun kind zoude te weeg brengen. Indien een ander dan de vader of de moeder de voogdij over het kind uitoefent, heft ook de voogd of de toeziende voogd, waar deze den voogd vervangt, in de gevallen, wermeld onder No. 1, 3, 4, 5 en 6 dezelfde bevoegdheid."*

[150] Art. 62 of BW. "*Dalam hal kedua orang tua tidak ada, maka kakek nenek dan wali atau wali pengawas, jika yang terakhir ini mengganti si wali, adalah berhak untuk mencegah perkawinan dalam hal-hal*

absence of grandparents, uncle or aunt may substitute them in exercising this right.[151] A former husband also has the possibility to prevent a marriage of his former wife, if she re-marries before the lapse of three hundred days after their divorce.[152] A prosecutor also has the right to prevent a marriage in the event that the marriage does not meet the substantive requirements.[153]

This petition for marriage prevention may be submitted by a family member or relative or guardian of one of the couple to a local district court.[154] Upon this petition, the relevant court will examine the case and make its decision as to whether it confirms or

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tersebut pada nomor 3, 4, 5 dan 6, pasal yang lalu. Dalam hal tersebut pada nomor 1, kakek-nenek dan wali atau wali pengawas, jika yang terakhir ini mengganti si wali, berhak mencegah perkawinan, jika izin mereka menjadi syarat." Translation: "In the absence of both parents, grandparents and guardian or supervising guardian, if the latter replaces the guardian, shall be entitled to prevent to prevent a marriage in the matters referred to in sub-articles 3, 4, 5 and 6 of the previous article. In matters referred to in sub-article 1, grandparents and guardian or supervising guardian, if the latter replaces the guardian, shall be entitled to prevent a marriage, if their permit is required." In Dutch: *"Bij gebreke van beide ouders zijn de grootouders en de voogd of de toeziende voogd, waar deze den voogd vervangt, bevoegd om het huwelijk te stuiten in de gevallen vermeld onder No. 3, 4, 5, en 6 van de voorgaande art. De grootouders, de voogd en de toeziende voogd zijn in het geval, onder No. 1 vermeld, tot stuiting bevoegd, wanneer hunne toestemming wordt vereischt."*

[151] Art. 63 of BW. "*Dalam hal kakek nenek tidak ada, maka saudara laki-laki dan perempuan, paman dan bibi, demikian pula wali dan wali pengawas, pengampu dan pengampu pengawas, berhak mencegah perkawinan: (1) bila ketentuan-ketentuan Pasal 38 dan Pasal 40 mengenai memperoleh izin kawin tidak diindahkan; (2) karena alasan-alasan seperti yang tercantum dalam nomor, 3, 4, 5, dan 6 dalam Pasal 61.*" Translation : "In the absence of grandparents, brothers and sisters, uncles and aunts, including guardian and supervising guardian, guardian (*pengampu*) and supervising guardian (*pengampu*), shall be entitled to prevent a marriage : (1) if the provisions of Article 38 and Article 40 on obtaining a marriage permit are not complied with; (2) for reasons as set out in sub-articles 3, 4, 5 and 6 of Article 61." In Dutch: "*Bij gebreke van grootouders kunnen de broeders, zusters, ooms en moeijen, mitsgaders de voogd, toeziende voogd, curator en toeziende curator een voorgenomen huwelijk stuiten: (1) wanneer de voorschriften van art. 38 en 40 omtrent het bekomen van verlof tot het aangaan van het huwelijk niet zijn in acht genomen; (2) om de redenen onder No. 3, 4, 5, en 6 van art. 61 uitgedrukt.*"

[152] Art. 64 of BW. "*Suami yang perkawinannya telah dibubarkan karena perceraian, diperbolehkan mencegah perkawinan bekas istrinya, apabila si yang terakhir ini hendak kawin lagi sebelum tiga ratus hari semenjak pembubaran perkawinan yang dulu.*" Translation: "A husband whose marriage has been dissolved due to divorce, shall be allowed to prevent the marriage of his former wife, in the event that she intends to re-marry before three hundred days as from the dissolution of the previous marriage." In Dutch: "*De echtgenoot, wiens huwelijk door echtscheiding is ontbonden, kan het huwelijk zijner voormalige echtgenoote stuiten, wanneer zij een nieuw huwelijk wil aangaan, voor het verloopen van drie honderd dagen na het ontbinden van het vroegere.*"

[153] Art. 65 of BW. "*Jawatan Kejaksaan adalah berwajib mencegah suatu perkawinan yang akan dilangsungkan, dalam hal-hal tersebut dalam pasal 27 sampai dengan 34.*" Translation: "Public prosecutor shall be obligated to prevent a marriage which will be held, in matters referred to in articles 27 until 34." In Dutch: "*Het openbaar ministerie is verplicht een voorgenomen huwelijk te stuiten, in de gevallen bij art. 27 to 34 ingesloten vermeld.*"

[154] Art. 17 (1) of MA 1974. "*Pencegahan perkawinan diajukan kepada Pengadilan dalam daerah hukum di mana perkawinan akan dilangsungkan dengan memberitahukan juga kepada pegawai pencatat perkawinan.*" Translation: "Marriage prevention shall be submitted to a Court in jurisdiction in which the marriage will be held by also notifying the marriage registration official."

refuses the prevention or even to order the prevention of such marriage.[155] Marriage prevention can be revoked by a district court's decision or by withdrawal of the respective petition by the relevant party.[156] A marriage can only be executed if the submitted petition for prevention has been revoked.[157]

The procedure above is mainly similar to the procedure in BW. The process of prevention starts by submitting a petition before a local district court which has jurisdiction.[158] A marriage can only take place after the court issues a decision or any authentic document stating that the prevention is eliminated. Any violation of this stipulation is subject to a fine along with its interest.[159]

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[155] See further Art. 21 of MA 1974.

[156] Art. 18 of MA 1974 "*Pencegahan perkawinan dapat dicabut dengan putusan Pengadilan atau dengan menarik kembali permohonan pencegahan pada Pengadilan oleh yang mencegah.*" Translation: "Marriage prevention may be revoked by a Judicial decision or by withdrawing the petition for prevention at the Court by the preventing person."

[157] Art. 19 of MA 1974 "*Perkawinan tidak dapat dilangsungkan apabila pencegahan belum dicabut.*" Translation: "A marriage cannot be held if prevention has not been revoked."

[158] Art. 66 of BW. *"Pencegahan perkawinan ditangani oleh Pengadilan negeri, yang di daerah hukumnya terletak tempat kedudukan Pegawai Catatan Sipil yang harus melangsungkan perkawinan itu."* Translation: "Marriage prevention shall be handled by a district Court, in jurisdiction of which the domicile of the Vital Records Official who must hold the marriage is located." In Dutch: *"Van de stuiting des huwelijks wordt kennis genomen door den raad van justitie, binnen welks regtsgebeid de ambtenaar van de den burgerlijken stand gevestigd is, voor wien het huwelijk moet worden voltrokken."*

[159] Art. 70 of BW. "*Apabila dilakukan pencegahan akan suatu perkawinan, maka pegawai catatan sipil tak diperbolehkan melangsungkan perkawinan itu, melainkan setelah disampaikan kepadanya suatu putusan hakim yang telah memperoleh kekuatan mutlak atau suatu akta resmi, dengan mana pencegahan itu telah dihapuskan; demikian itu atas ancaman membayar segala biaya, rugi dan bunga. Jika terjadi kiranya, suatu perkawinan dilangsungkan sebelum pencegahan dihapuskan, maka perkara mengenai pencegahan itu boleh dilanjutkan, dan perkawinan boleh dinyatakan batal.*" Translation: "In the event that the marriage is obstructed, the official of the Civil Registry shall not execute the marriage unless a legal judgment or authentic deed, whereby the obstruction is rendered legally void, has been submitted to him Violation of this provision shall render the guilty party liable for compensation in the form of costs, damages and interest. In the event that the marriage is entered into prior to such obstruction being cancelled, the lawsuit regarding that obstruction may be continued, and the marriage shall be rendered legally invalid in the event that the claim is awarded to the opposing party." In Dutch: "*Wanneer er stuiting van een huwelijk plaats heeft, zal het aan der ambtenaar van den burgerlijken stand niet geoorloofd zijn hetzelve te voltrokken, dan nadat aan hem zal zijn ter hand gesteld een vonnis in kracht van gewijsde gegaan, of eene authentieke acte, waarbij de stuiting is opgeheven, of straffe van vergoeding van kosten, schaden en interessen. Wanneer het huwelijk mogt zijn voltrokken voor dat de stuiting is opgeheven, zal het geding ter zake dier stuiting kunnen worden voortgezet, en het huwelijk worden nietig verklaard, bijaldien de eisch aan den opposant is toegewezem.*"

2.4.2 Cancellation of Marriage

MA 1974 stipulates that marriage can be cancelled or annulled upon a petition of any family member of the relevant couple. [160] The husband or wife or even child of the respective couple or a prosecutor is authorized to submit a petition for cancellation in certain cases.[161] This petition must be submitted to a district court, which has jurisdiction over the place of celebration of the relevant marriage or the matrimonial domicile of the couple (husband or wife).[162]

A petition for cancellation can only be submitted based on particular reasons as stipulated in MA 1974.[163] Marriage solemnized by an unauthorized officer or without any legal guardian or without two witnesses may be cancelled upon a petition. A family member of the husband of wife can submit a petition for cancellation of such marriage. The right of marriage cancellation lapses if the husband and wife have had cohabitation and are able to present a marriage certificate, drawn up by the unauthorized officer. In such case, the relevant husband and wife are obligated to renew their marriage certificate for the sake of validation.

A forced marriage held under any threats or marriage held with false allegation can be cancelled. If such threat is ceased or the husband or wife who has false allegation realizes

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[160] Art. 22 of MA 1974. *"Perkawinan dapat dibatalkan apabila para pihak tidak memenuhi syarat-syarat untuk melangsungkan perkawinan."* Translation: "A marriage may be cancelled if the parties do not meet the requirements to hold a marriage."

[161] Art. 23 of MA 1974. *"Yang dapat mengajukan pembatalan perkawinan yaitu: (a) Para keluarga dalam garis keturunan lurus ke atas dari suami atau isteri; (b) Suami atau isteri; (c) Pejabat yang berwenang hanya selama perkawinan belum diputuskan; (d) Pejabat yang ditunjuk tersebut ayat (2) Pasal 16 Undang-undang ini dan setiap orang mempunyai kepentingan hukum secara langsung terhadap perkawinan tersebut, tetapi hanya setelah perkawinan itu putus."* Translation: "(1) Those who may submit marriage cancellation shall be namely: (a) Family members in the direct ascending lineage of a husband or wife; (b) Husband or wife; (c) Authorized official only insofar as a marriage has not been dissolved; (d) Appointed official referred to in Article 16 paragraph (2) of this Law and any other persons who have direct legal interest towards the marriage, however only after the marriage has been dissolved."

Art. 23 of MA 1974. *"Yang dapat mengajukan pembatalan perkawinan yaitu: (a) Para keluarga dalam garis keturunan lurus ke atas dari suami atau isteri; (b) Suami atau isteri; (c) Pejabat yang berwenang hanya selama perkawinan belum diputuskan; (d) Pejabat yang ditunjuk tersebut ayat (2) Pasal 16 Undang-undang ini dan setiap orang mempunyai kepentingan hukum secara langsung terhadap perkawinan tersebut, tetapi hanya s*

etelah perkawinan itu putus." Translation: "(1)) Those who may submit marriage cancellation shall be namely: (a) Family members in the direct ascending lineage of a husband or wife; (b) Husband or wife; (c) Authorized official only insofar as a marriage has not been dissolved; (d) Appointed official referred to in Article 16 paragraph (2) of this Law and any other persons who have direct legal interest towards the marriage, however only after the marriage has been dissolved."

dup bersama sebagai suami istri dan dapat memperlihatkan akte perkawinan yang dibuat pegawai pencatat perkawinan yang tidak berwenang dan perkawinan harus diperbaharui supaya sah." Translation: "(1) A marriage which is held before an authorized registration officer, or an illegal marriage guardian, or in the absence of 2 (two) witnesses may be claimed for cancellation by relatives of either the husband or wife"

the situation and 6 months after such cessation or realization, they stay to live in cohabitation, then the right to cancel the marriage lapses.[164]

Marriage cancellation has legal enforcement as of the date of marriage. This judicial decision will not be retroactive upon children who are born from such marriage, a couple who have good faith except for matrimonial assets and any third parties who have good faith.[165]

The provisions stated above are similar to the provisions provided in BW. Marriage annulment can be petitioned for certain reasons,[166] among others if one of the couples does not meet the age requirement or is underage, the groom or bride is still bound to his/her former marriage, or the officer is not entitled to held a marriage. The legal

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[164] Art. 27 of MA 1974. *"(1) Seorang suami atau istri dapat mengajukan permohonan pembatalan perkawinan apabila perkawinan dilangsungkan di bawah ancaman yang melanggar hukum. (2) Seorang suami atau istri dapat mengajukan permohonan pembatalan perkawinan apabila pada waktu perkawinan terjadi salah sangka mengenai diri suami atau istri. (3) Apabila ancaman telah berhenti, atau yang bersalah sangka itu menyadari keadaannya, dan dalam jangka waktu 6 bulan setelah itu masih tetap hidup sebagai suami istri, dan tidak mempergunakan haknya untuk mengajukan permohonan pembatalan, maka haknya gugur."* Translation: "(1) A husband and wife may submit the request for marriage cancellation if such marriage is held under unlawful coercion. (2) A husband or wife may submit the request for marriage cancellation if at the time of marriage, there is misassumption of the husband or wife. (3) If a threat has stopped, or the misassuming party becomes aware of the situation, and within 6 months afterwards they still live as a husband and wife, and do not exercise their right to submit the request for marriage cancellation, their right shall be denied."

[165] Art. 28 of MA 1974. *"(1) Batalnya suatu perkawinan dimulai setelah keputusan Pengadilan mempunyai kekuatan hukum yang tetap dan berlaku sejak saat berlangsungnya perkawinan. (2) Keputusan tidak berlaku surut terhadap: (a) anak-anak yang dilahirkan dari perkawinan tersebut; (b) suami atau istri yang bertindak dengan itikad baik, kecuali terhadap harta bersama, bila pembatalan perkawinan didasarkan atas adanya perkawinan lain yang lebih dahulu; (c) orang-orang ketiga lainnya tidak termasuk dalam a dan b sepanjang mereka memperoleh hak-hak dengan itikad baik sebelum keputusan tentang pembatalan mempunyai kekuatan hukum tetap."* Translation: "(1) Cancellation of a marriage shall start after a Judicial decision has permanent legal force and shall be applicable since the holding of marriage. (2) A decision shall not apply retroactively to: (a) children born out of such marriage; (b) a husband and wife who act in good faith, except to matrimonial assets, if the marriage cancellation is based on the existence of another previous marriage; (c) other third parties not included in a and b insofar as they have rights in good faith before a decision on cancellation has permanent legal force."

[166] See Art. 86 of BW stipulates that the ground for marriage cancellation is about the non-fulfillment of monogamy principle, Art. 87 of BW stipulates that the ground for marriage cancellation is the absence of approval of a former spouse, Art. 88 of BW stipulates marriage cancellation of a person who is under guardianship, Art. 89 of BW stipulates that the ground for marriage cancellation is that parties in a marriage do not reach the minimum age for a marriage, Art. 90 of BW stipulates that the ground for marriage cancellation is any contradiction to the requirements referred to in Art. 30 (marriage prohibition between siblings), Art. 31 (marriage prohibition between brother- or sister-in-law, uncle and niece, aunt and nephew), Art. 32 (prohibition to marry the partner of adultery) and Art. 33 (regarding the marriage termination because of death, an absence of 10 years and followed by another marriage by the surviving spouse, are the ground for marriage cancellation, division of table and bed, as well as divorce), Art. 91 of BW stipulates that the ground for marriage is the absence of approval from father, mother, and grandparents as may be required, Art. 92 stipulates that the ground for marriage cancellation is that the officer is an un-authorized officer or the number of witnesses is less than the one required by law.

consequences of annulment will not influence the status of children who are born from a marriage which is held in good faith at the first place[167] and the rights of any third parties who have acted in good faith toward the respective couple.[168] Any marriage annulment can only be based on a judicial decision.[169]

One of annulment cases was decided on by the Depok District Court.[170] A marriage held at the Depok Religious Affairs Office was declared null and void, including its legal consequences. The judge considered that Defendant I (Australian national) and Co-defendant (Indonesian national) married without any approval of the relevant district court as stipulated in Art. 4 (1) of MA 1974.[171] Approval of the district court was mandatory because Defendant I married the Petitioner two months before the marriage between Defendant I and Co-defendant.

Marriage annulment can also be conducted in the event that such marriage contradicts one of the requirements of the couple's religion. There was annulment petitioned by the officer solemnizing the marriage. It appeared that the wife is the biological sister of the existing wife of the husband. Relationship between the existing wife and the bride contradicted the requirements in Islam. The officer argued that at the time of marriage solemnization, he did not have any information about it.[172] The cases above show that

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[167] Art. 95 of BW. "*Suatu perkawinan, walaupun telah dinyatakan batal, mempunyai segala akibat perdatanya, baik terhadap suami istri, maupun terhadap anak-anak mereka, bila perkawinan itu dilangsungkan dengan itikad baik oleh kedua suami istri itu.*" Translation: "A marriage, although it has been declared cancelled, shall have all of its civil consequences, both for the husband and wife and their children, if the marriage is held in good faith by both spouses." In Dutch: *"Een huwelijk, hetwelk nietig verklaard is, heeft niettemin alle deszelfs burgerlijke gevolgen, zoowel ten opzigte der echtgenooten, als van de kinderen, wanner hetzelve te goeder trouw door beide de echtgenooten is aangegaan."*

[168] Art. 98 of BW. "*Batalnya suatu perkawinan tidak boleh merugikan pihak ketiga, bila dia telah berbuat dengan itikad baik dengan suami istri itu.*" Translation: "Cancellation of a marriage may not harm any third party, if he/she has acted in good faith to the spouses." In Dutch: "*De nietigheid eens huwelijks kan aan de regten van derden geen nadeel toebrengen, wanneer deze te goeder trouw met de echtgenooten hebben gehandeld*."

[169] See the Art. 85-99a of BW. Art. 85 of BW: "*Batalnya suatu perkawinan hanya dapat dibatalkan oleh hakim.*" Translation: "A marriage may only be cancelled by a judge." In Dutch: "*De nietigheid eens huwellijks kan alleen door den regter worden uitgesproken.*"

[170] Decision of Depok Religious Court No. 324/Pdt.G/2006/PA.Dpk., Elisa binti Udin Saragih vs. Darren Andrew Fouracre bin Frederick George Fouracre and Nia Erna Susanti binti Soewartono, and KUA.

[171] Art. 4 (1) of MA 1974. "*(1) Dalam hal seorang suami akan beristri lebih dari seorang, sebagaimana tersebut dalam Pasal 3 ayat (2) Undang-undang ini, maka ia wajib mengajukan permohonan kepada Pengadilan di daerah tempat tinggalnya.*" Translation: "(1) In the event a husband will have more than one wife, as referred to in Article 3 paragraph (2) of this Law, he shall be obligated to submit a request to a Court of its domicile."

[172] Decision of the Religious Court No. 34/PPdt.G/2011/PA.Pdn dated May 12, 2011. KUA vs Samiaro Hulu alias Soleh Hulu, Siti Tutik Isnaini, Syarifah and Ali Imran Amir Harahap.

any contradiction to requirements of the religion's law can be a ground for cancellation.[173]

2.5 Polygamous Marriage

The polygamy issue distinguishes MA 1974 from BW. MA 1974 adopts limited monogamy principles. Polygamy in MA 1974 is allowed under particular circumstances. BW adopts the absolute monogamy principle that any contradiction could cause imprisonment.

The official elucidation of Art. 1 of MA 1974 mentions that a marriage has a close relationship with household or family and having descendant. Descendant constitutes part of marriage purposes. Therefore, when a marriage bears no descendant, polygamy is one of the alternatives which may be taken by such family. This purpose is different from marriage in BW whereby descendant is not part of marriage purposes.[174]

Art. 3 of MA 1974 mentions explicitly that a husband can only have one wife at the same time, and vice versa, a wife can only have one husband at the same time. However, a court can grant its approval if the husband intends to practice polygamy, as long as it is desired by the relevant couple.[175] The court must consider all of the requirements as stipulated in Art. 4 and Art. 5 of MA 1974 before giving its approval, including whether or not the husband can practice polygamy according to his religion's law.

In the event that a husband has an intention to have more than one wife; he has to submit his request to a local district court where he lives. Upon such request, the relevant district court can give permission, or to the contrary, reject it.[176] The court can give permission

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[173] Martiman Prodjohamidjojo, *Hukum Perkawinan Indonesia* (translation by the author: Indonesian Marriage Law), (Jakarta: PT. Abadi, 2001), pp. 22-25. The other reasons from the religion's law are, among others, marriage between a man and his step-daughter, or ex mother-in-law, or his niece, or marriage before the lapse of *iddah* period, or marrying a pregnant woman.

[174] Wijono Prodjodikoro, *Op.Cit.,* p. 1. He states that the absence of descendant is not a reason to have divorce since it is not the primary purpose of marriage. Living together or cohabitation between a husband and wife is the primary purpose of marriage.

[175] Art. 3 of MA 1974. "*(1) Pada asasnya dalam suatu perkawinan seorang pria hanya boleh mempunyai seorang istri. Seorang wanita hanya boleh mempunyai seorang suami. (2) Pengadilan, dapat memberikan izin kepada seorang suami untuk beristri lebih dari seorang apabila dikehendaki oleh pihak-pihak yang bersangkutan.*" Translation: "(1) In principle, a husband may only have one wife in a marriage. A woman may only have one husband. (2) A Court, may give a permit to a husband to have more than one wife, if the parties concerned wish to do so."

[176] Art. 4(1) of MA 1974 jo. Art. 40 of GR No. 9 of 1975. Art. 4 (1) of MA 1974: "*(1) Dalam hal seorang suami akan beristri lebih dari seorang, sebagaimana tersebut dalam Pasal 3 ayat (2) Undang-undang ini, maka ia wajib mengajukan permohonan kepada Pengadilan di daerah tempat tinggalnya.*" Translation: "(1) In the event that a husband will have more than one wife, as referred to in Article 3 paragraph (2) of this Law, he shall be obligated to submit a request to a Court of his domicile."

for polygamy only for certain reasons as mentioned in MA 1974, namely if the wife cannot fulfill her obligations as a wife or suffers physical disability or has an incurable sickness or cannot give birth.[177] Before giving the permission, the relevant court is obligated to ask whether or not his existing wife or (wives) agree(s) to be a co-wife. In addition, the husband must provide a guarantee that he is able to afford the necessity of his existing wife (wives) and all children, and a commitment that he will treat his wife (wives) and all children fairly and justly. [178]

An additional requirement applies to civil servants whose second marriage must have an approval of their direct superior. The same approval is required in the event that a female civil servant has the intention to become (or to be a) second wife. The

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Art. 40 of GR No. 9 of 1975: *"Apabila seorang suami bermaksud untuk beristri lebih dari seorang, maka ia wajib mengajukan permohonan secara tertulis kepada Pengadilan."* Translation: "In the event that a husband intends to have more than one wife, he shall be obligated to submit a request in writing to a Court."

[177] Art. 4(2) of MA 1974 of. Art. 41 (a) of GR No. 9 of 1975. Art. 4 (2) of MA 1974: *"(2) Pengadilan dimaksud dalam ayat (1) pasal ini hanya memberikan izin kepada seorang suami yang akan beristri lebih dari seorang apabila: (a) istri tidak dapat menjalankan kewajibannya sebagai istri; (b) istri mendapat cacat badan atau penyakit yang tidak dapat disembuhkan; (c) istri tidak dapat melahirkan keturunan.*" Translation: "(2) The Court referred to in paragraph (1) of this article may only give a permit to a husband who will have more than one wife if: (a) the wife is unable to perform her obligations as a wife; (b) the wife suffers from physical disability or incurable disease; (c) the wife cannot is unable to bear any child."

Art. 41 (a) of GR No. 9 of 1975: *"The Court shall further examine the conditions as to whether:* - the wife is unable to perform her obligations as a wife; - the wife suffers from physical disability or incurable disease; - the wife is unable to bear any child.*"*

[178] Art. 5 (1) (a) of MA 1974: *"(1) Untuk dapat mengajukan permohonan kepada Pengadilan, sebagaimana dimaksud dalam Pasal 4 ayat (1) Undang-undang ini, harus dipenuhi syarat-syarat sebagai berikut: (a) adanya persetujuan dari istri/istri-istri; (b) adanya kepastian bahwa suami mampu menjamin keperluan-keperluan hidup istri-istri dan anak-anak mereka; (c) adanya jaminan bahwa suami akan berlaku adil terhadap istri-istri dan anak-anak mereka."* Translation*:* "(1) To be able to submit a request to a Court, as referred to in Article 4 paragraph (1) of this Law, the following requirements must be fulfilled: (a) existence of approval from the wife/wives; (b) assurance that the husband is able to ensure the necessities of the wives and their children; (c) guarantee that the husband will treat the wives and their children justly."

Art. 41 (b) (c) of GR No. 9 of 1975: *"Pengadilan kemudian memeriksa mengenai: … (b) ada tidaknya persetujuan dari istri, baik persetujuan lisan maupun tertulis, apabila persetujuan ini merupakan persetujuan lisan, persetujuan itu harus diucapkan di depan sidang pengadilan; (c) ada atau tidaknya kemampuan suami untuk menjamin keperluan hidup istri-istri dan anak-anak, dengan memperlihatkan: (i) surat keterangan mengenai penghasilan suami yang ditandatangani oleh bendahara tempat bekerja; (ii) surat keterangan pajak penghasilan; atau (iii) surat keterangan lain yang dapat diterima oleh Pengadilan; (d) ada atau tidak adanya jaminan bahwa suami akan berlaku adil terhadap istri-istri dan anak-anak mereka dengan pernyataan atau janji dari suami yang dibuat dalam bentuk yang ditetapkan untuk itu."* Translation: "The Court shall then examine the following: … (b) existence of approval of the wife, either verbal or in writing, if this approval constitutes a verbal approval, such approval must be stated before a hearing; (c) existence of the husband's capability to ensure the necessities of the wives and their children, by showing: (i) statement on the husband's income signed by the treasurer of the workplace; (ii) statement on income tax; or (iii) other statements acceptable to the Court; (d) existence of guarantee that the husband will treat the wives and their children justly by statement or promise of the husband in a form designated for such purpose."

requirement above is aimed at giving protection for women, so that they will not become a co-wife easily.[179]

2.5.1 Decision of the Constitutional Supreme Court on a Polygamous Marriage

In 2007, a case was filed before the Constitutional Supreme Court whereby the petitioner petitioned a judicial review of the monogamy principle in MA 1974 and requirements that a husband must have prior approval of his existing wife and a district court to practice polygamy.[180] Those requirements, according to the petitioner, contradict Art. 29 of the Indonesian Constitution regarding freedom to worship according to the religion, and human rights as provided in Art. 28B (1), Art. 28E (1), Art. 28I (1) and (2).[181] The petitioner argued that a wife (wives) should never be asked for their approval when a husband has the intention to practice polygamy. Therefore, according to him, such particular requirement hampers the husband from performing polygamy.[182]

According to the petitioner, Art. 5 of MA 1974[183] which requires a husband to have prior approval of his wife to practice polygamy, causes a difficulty thus preventing the

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[179] Indonesia, Government Regulation No. 10 of 1983 regarding Marriage and Divorce Permit for Civil Servants *(Izin Perkawinan dan Perceraian Bagi Pegawai negeri Sipil)*, State Gazette No. 13 of 1983, as amended to date.

[180] Decision of the Constitutional Supreme Court No. 12/PUU-V/2007. See the polygamy provisions set forth in Art. 3, 4, 5 (1), 9, 15, and Art. 24 of MA 1974. The decision is available at http://www.mahkamahkonstitusi.go.id/index.php?page=web.PerkaraRegistrasiPUU&id=105&kat=1&cari=, the official website of the Constitutional Supreme Court, last accessed on March 25, 2018.

[181] Art. 28B (1) of the Indonesian Constitution. "*(1) Setiap orang berhak membentuk keluarga dan melanjutkan keturunan melalui perkawinan yang sah.*" Translation: "(1) Every person shall be entitled to establish a family and continue descendants by a valid marriage." Art. 28E (1) of the Indonesian Constitution. "*(1) Setiap orang bebas memeluk agama dan beribadat menurut agamanya, memilih pendidikan dan pengajaran, memilih pekerjaan, memilih kewarganegaraan, memilih tempat tinggal di wilayah negara dan meninggalkannya, serta berhak kembali.*" Translation: "(1) Every person shall be free to adhere a religion and worship according to his/her religion, choose education and teaching, choose occupation, choose nationality, choose residence in a state territory and leave it, as well as has the right to return." Art. 28I (1) and (2) of the Indonesian Constitution. *"(1) Hak untuk hidup, hak untuk tidak disiksa, hak kemerdekaan pikiran dan hati nurani, hak beragama, hak untuk tidak diperbudak, hak untuk diakui sebagai pribadi di hadapan hukum, dan hak untuk tidak dituntut atas dasar hukum yang berlaku surut adalah hak asasi manusia yang tidak dapat dikurangi dalam keadaan apapun. (2) Setiap orang berhak bebas atas perlakuan yang diskriminatif atas dasar apapun dan berhak mendapatkan perlindungan terhadap perlakuan yang bersifat diskriminatif itu."* Translation: "(1) The right to live, right to be free from torture, right to freedom of thought and conscience, right to religion, right to be free from slavery, right to be recognized as a person before the laws, and right to be free from claim for retroactive legal bases shall be human rights which cannot be prejudiced in any circumstances. (2) Every person shall be entitled to be free from discriminatory treatment based on any grounds and shall be entitled to obtain protection from such discriminatory treatment."

[182] Decision of the Constitutional Supreme Court No. 12/PUU-V/2007, pp. 2-17.

[183] Art. 5 (1) of MA 1974, see footnote No. 135 above.

husband do so. The petitioner is of the opinion that these provisions prevent a man from practicing polygamy, which is a form of worship allowed in Islam.[184]

Refutation from the Government of Indonesia was submitted in the judicial process. At its core, the government stated that Art. 28J (2) of the Indonesian Constitution provides a chance to each Indonesian national to exercise their rights and freedom to have a family and descendant. However, in exercising their rights, everyone must be subject to the restriction as set forth in laws and regulations which have the objectives to assure the acknowledgement and recognition of other's rights, as well as to fulfil justice according to the values of moral, religion and public policy in a democratic society. According to the government, human rights are not rights which have no limitation.

The Government was also of the opinion that polygamy is not included in human rights as set forth in Art. 28B of the Indonesian Constitution. Human rights include the rights to build and form a family since a husband and wife can fulfill their biological needs and/or carry their descendant. Without polygamy, a person still has the opportunity to do that. In addition, the government was of the opinion that Islam adheres to the principle of monogamy, while polygamy is allowed to help women who become widows since their husband passes away in a war at that time. MA 1974 is at maximum compromise which can be acquired by Indonesia considering the value of religions, including Islam. Religious values adopted in MA 1974 constitute the minimum standards or fundamental provisions which will not be neglected by any other religion. In addition, polygamy is not an obligation, which will reduce the essence of worship. The provisions of MA 1974 are for the legal certainty of husband and wife, in relation to rights and obligations as well as procedure for polygamy.[185]

The government presented its counter arguments by stating that human rights are not un-limited rights, polygamy is not part of human rights, and Islam actually adopts the monogamy principle. The right to polygamy is exercised in an emergency condition. Therefore, polygamy is given with certain conditions as referred to in Art. 4 and 5 of MA 1974 thus these provisions are the best compromising articles due to other existing religions in Indonesia. In relation to polygamy in Islam, it should be understood that Islam is trying to repair the condition gradually by giving a number for limitation. It is aimed at repairing unfair treatment to women. Therefore, polygamy is not an obligation of worship but an emergency exit. These provisions of MA 1974 are to pursue legal

[184] The petitioner proposed two expert witnesses, Dr. Ahmad Sudirman, M.A. and Dr. Eggi Sudjana, S.H., M.Si. to support the petition. Decision of the Constitutional Supreme Court No. 12/PUU-V/2007, pp. 19-22.

[185] *Ibid.,* pp. 22-42.

certainty.[186] Those explanations were given from expert Prof. Dr. M. Quraish Shihab and Prof. Dr. Hj. Huzaemah T. Yanggo.[187]

Upon the request and all arguments presented in the proceeding, the Constitutional Court gave its point of view. The Constitutional Court accepted the arguments of Prof. Dr. M. Quraish Shihab and Prof. Dr. Hj. Huzaemah T. Yanggo that Islam allows polygamy in order to give protection for woman.[188] Polygamy is an exception which may be practiced under certain conditions; normatively the reasons and requirements for polygamy are determined by laws and enforced through a district court's decision. It comes along with an obligation of a husband to treat his wives justly and fairly. Therefore, polygamy is not a form or means of worship.[189]

In addition, the Constitutional Supreme Court stated that the provisions on polygamy are devoted for Indonesian nationals who are allowed to do so according to his religions. Therefore, it will not be reasonable if MA 1974 applies polygamy provisions to those who are not allowed to do so according to their religion. The articles provided in MA 1974 are for legal protection of the rights of wife and co-wife which are actually equal to the obligations of a husband who will practice polygamy. Those articles are to pursue the objective of marriage as referred to in Art. 1 of MA 1974. Such provisions shall not be interpreted as abolishing the provisions allowing polygamy.[190]

Therefore, the Constitutional Supreme Court states and confirms that the provisions on polygamy do not contradict the constitutional rights as mentioned in Art. 28B (1) and Art. 28E (1), Art. 28I (1) and Art. 29 of the Indonesian Constitution. Therefore, the petition for polygamy was refused.[191]

2.5.2 Note from the Constitutional Supreme Court

The author agrees with the argument of the Constitutional Supreme Court. In addition, it suffices to remark that an equal position of a husband and wife is reflected from the requirements for polygamy in MA 1974 and from the requirement for consent from a husband and wife to enter into a marriage. Therefore, as a consequence of such equality,

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[186] *Ibid.*, pp. 35-37, 47-65.

[187] *Ibid.*, pp. 63-69.

[188] *Ibid.*, pp. 91-98.

[189] *Ibid.*

[190] *Ibid.*, pp. 98.

[191] *Ibid.*, pp. 99-100.

it is reasonable if a court's approval can only be given in the event that a wife agrees to the second marriage of her husband.

The equal position of a husband and wife can be also seen in the position of a wife in the society. She has the right to take any legal actions in the society, the same as her husband. In the field of marital assets, a wife can also take any legal actions, with the approval of his husband, and this condition applies vice versa.

This equality is different from the rights and obligations of husband and wife. In terms of rights and obligations, MA 1974 mentions clearly that the balance of rights and obligations between a husband and wife. However, those rights and obligations of each husband and wife are different from each other due to the function of a man and woman. They are not and will not be the same since their capabilities are different; however, it will not make any influence to the equal position of husband and wife.[192] This is the reflection of emancipation of women in MA 1974.

2.6 Consequences of Marriage

MA 1974, the same as BW, provides the stipulation of legal consequences of marriage. Such consequences can be categorized in three types namely the legal relationship between the husband and wife, legal relationship upon marital assets, and lastly, legal relationship between parents and children.

2.6.1 Rights and Obligations of Husband and Wife

The legal relationship between a husband and wife is stipulated in Chapter VI, Art. 30 up to Art. 34 of MA 1974. The essential rights and obligations of a husband and wife are to carry obligations jointly in order to maintain their family or household as the basic structure of the society.[193] Furthermore, a husband and wife must love and respect each other, be faithful and physically as well as emotionally help one another.[194]

In relation to the rights and position of husband and wife, MA 1974 specifies that the rights and position of wife is equal to the rights and position of her husband, either in

[192] Wahyono Darmabrata, *Op. Cit.*, pp. 55-58.

[193] Art. 30 of MA 1974 "*Suami istri memikul kewajiban yang luhur untuk menegakkan rumah tangga yang menjadi sendi dasar dari susunan masyarakat.*" Translation: "A husband and wife shall bear a noble obligation to uphold a household which become the basic principle of the public structure."

[194] Art. 33 of MA 1974 "*Suami istri wajib saling cinta mencintai, hormat menghormati, setia dan memberi bantuan lahir bathin yang satu kepada yang lain.*" Translation: "A husband and wife shall be obligated to love, respect, faithful to each other and give physical and emotional support to one another."

their own household or in the society.[195] Therefore, each of them has the right to take any legal actions. Equal in this term does not necessarily mean that they have the same rights and obligations. Each of them has particular obligations; yet balancing each other. A husband will be called as the head of household and a wife will be the mother of household. A husband must protect his wife and provide necessities of the household according to his capacity while a wife must manage the household at her best. If a husband or wife neglects these obligations, the other party is entitled to claim a lawsuit before a court.[196]

The stipulation of rights and obligations of husband and wife reflect emancipation between a husband and wife, supported by women in the formulation of MA 1974. Those rights and obligations are different from each other because of the differences in the function of a man and woman. They are not and will not be the same since their capabilities are different, yet completing each other to establish a family.[197]

MA 1974 and BW have a similarity in their description of several provisions, among others provision stating that a husband and wife must help and love each other. Art. 103 of BW mentions that "*Spouses must be faithful one another, help and support each other*"[198], while Art. 33 of MA 1974 states that *"A husband and wife shall love and respect each other, be faithful one another and give one another physical and moral support."*[199]

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[195] Art. 31 (1) of MA 1974. "*(1) Hak dan kedudukan istri adalah seimbang dengan hak dan kedudukan suami dalam kehidupan rumah tangga dan pergaulan hidup bersama dalam masyarakat. (2) Masing-masing pihak berhak untuk melakukan perbuatan hukum. (3) Suami adalah kepala rumah tangga keluarga dan istri ibu rumah tangga.*" Translation: "(1) The rights and position of a wife shall be equal to the rights and position of a husband in the household life and social life in the society. (2) Each party shall be entitled to take any legal actions. (3) A husband shall be the head of household and a wife shall be the housewife."

[196] Art. 34 of MA 1974 *"(1) Suami wajib melindungi istrinya dan memberikan segala sesuatu keperluan hidup berumah tangga sesuai dengan kemampuannya. (2) Istri wajib mengatur urusan rumah tangga sebaik-baiknya. (3) Jika suami atau istri melalaikan kewajibannya masing-masing dapat mengajukan gugatan kepada Pengadilan."* Translation: "(1) A husband shall be obligated to protect his wife and provide all the necessities of household according to his capability. (2) A wife shall be obligated to manage household affairs to the best possible extent. (3) In the event that a husband or wife neglects his/her obligation, each of them may submit a claim to a Court."

[197] Wahyono Darmabrata, *Op.Cit.,* pp. 55-71

[198] Art. 103 of BW. "*Suami istri wajib setia satu sama lain, saling menolong dan saling membantu.*" Translation: "*A husband and wife shall be obligated to be faithful to one another, help and support each other*" In Dutch: *"De echtegenooten zijn elkander wederkeering getrouwheid, hulp en bijstand verschuldigd."*

[199] Art. 33 of MA 1974. *"Suami istri wajib saling cinta mencintai hormat menghormati, setia dan memberikan bantuan lahir bathin yang satu kepada yang lain."* Translation: "A husband and wife shall be obligated to love, respect, faithful to each other and give physical and emotional support to one another."

MA 1974 and BW require that a husband and wife live together in the same place. A husband must accept his wife in the house. An exception is acceptable only for particular reasons. However, MA 1974 requires that a husband and wife have the same domicile as agreed between them.[200] The agreement or mutual consent between a husband and wife is required to determine a matrimonial domicile. While BW stipulates that a wife must stay with her husband, anywhere which is proper and necessary as her husband thinks proper. In this matter, BW gives more freedom to a husband to determine a matrimonial domicile.[201] It is stated that a wife must follow her husband to a place where he can concentrate his activities. In addition, a husband has to manage common assets, including the majority of his wife's assets, determine a domicile, and also decide on issues related to parental authority.

Both MA 1974 and BW mention that a husband is the head of family. Following such phrase, MA 1974 mentions that a wife is housewife. In the same article, MA 1974 mentions that each party, husband or wife, is entitled to take any legal actions. Meanwhile, BW mentions differently by stating that a wife has to obey her husband. One of the consequences, a wife is incompetent to take any legal actions unless she has the approval of her husband to do so. A wife is also incompetent to manage her own assets. The thought behind this provision is that only one party can be a leader in a family, and it is the husband. The incompetence of a wife is stated straightforwardly in the contract law section, particularly in Art. 1330 of BW stating that she otherwise has an equal status with a person under guardianship or an underage child. It is stated that "*The following individuals are incompetent to conclude an agreement: .... (3) married women, in the event that it is stipulated by law, and in general, individuals who are prohibited by law from concluding a specific agreement.*" A wife can take a legal action on her own if she is accompanied by her husband. The incapacity of a wife is only applied to her own assets. A wife is capable of taking legal actions such as to recognize

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[200] Art. 32 of MA 1974. *"(1) Suami istri harus mempunyai tempat kediaman yang tetap. (2) Rumah tempat kediaman yang dimaksud dalam ayat (1) pasal ini ditentukan oleh suami istri bersama."* Translation: "(1) A husband and wife must have a permanent domicile. (2) The domicile referred to in paragraph (1) of this article shall be determine by the husband and wife together."

[201] Art. 106 of BW. *"Setiap istri harus patuh kepada suaminya. Dia wajib tinggal serumah dengan suaminya dan mengikutinya, di manapun dianggapnya perlu untuk bertempat tinggal."* Translation: "Every wife must obey her husband. She shall be obligated to live in the same house with her husband and follow him, wherever he deems necessary to reside." In Dutch: *"De vrouw is aan haren man gehoorzaamheid verschuldigd. Zij is verplicht met den man zamen te wonen en hem overal te volgen, waar hij dienstig oordeelt zijn verblijf te houden."*

Art. 107 of BW. "Setiap suami wajib menerima istrinya di rumah yang ditempatinya. Dia wajib melindungi istrinya, dan memberinya apa saja yang perlu, sesuai dengan kedudukan dan kemampuannya." Translation: "Every husband shall be obligated to receive his wife in the house occupied by him. He shall be obligated to protect his wife, and provide her with necessities, in accordance with his position and capability." In Dutch: *"De man is perligt zijne vrouw bij zich te ontvangen in het huis hetwelk hij bewoont."*

her illegitimate children, ask for guardianship over her father, and act as a guardian. A wife has to obtain the approval of her husband to take a position as an official (for instance, a director or commissioner of a company) since her position can impact her assets.[202] The incapacity of a wife was no longer applied in 1963, so a wife is entitled to take any legal actions to manage common assets.[203] It was advised to ignore the provision pursuant to Circular of the Supreme Court No. 3 of 1963 dated August 4, 1963. These articles were considered to be out of date.

Based on the matter above, there are two differences between those provisions. First, with respect to the matrimonial domicile of a husband and wife, the provisions of MA 1974 give a wife the opportunity to agree and give consent to her husband about their house or matrimonial domicile; second, the capacity of a wife which her to take any legal actions individually. MA 1974 mentions that a husband and wife can take any legal actions over their assets or anything. BW states to the contrary whereby a wife cannot take any legal actions or even attend or be present before a court. In relation to these matters, MA 1974 gives a more equal position between a husband and wife than BW.

2.6.2 Rights and Obligations of Parents and Children

The obligations of a husband and wife toward their children are concluded in Chapter X of MA 1974 regarding the rights and obligations of parents to their children. MA 1974 stipulates that parents have the obligations to nurture and educate their children at their best, until they are married or independent. These obligations survive even the termination of a marriage.[204] Before children reach the age of eighteen years old or are married and as long as the parent's authority is not revoked, parents represent their children to take any legal actions before or outside a court, also known as joint custody.[205]

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[202] Zulfa Djoko Basuki, *Op.Cit.*, p. 26.

[203] See Footnote No. 32 in sub-chapter 1.1 *"……The revoked articles are: (1) Art. 108 and Art. 110 of BW regarding a wife's authority to take a legal action. Therefore, a wife is also authorized to take legal actions and has capabilities equal to her husband. ….."*. See also Circular of the Supreme Court No. 3 of 1963 dated August 4, 1963 point No. 1 which advises that these stipulations (Art. 108 and 110 of BW) should be considered as no longer applicable.

[204] Art. 45 of MA 1974 *"(1) Kedua orang tua wajib memelihara dan mendidik anak-anak mereka sebaik-baiknya. (2) Kewajiban orang tua yang dimaksud dalam ayat (1) pasal ini berlaku sampai anak itu kawin atau dapat berdiri sendiri, kewajiban mana berlaku terus meskipun perkawinan antara kedua orang tua putus."* Translation: "(1) Both parents shall be obligated to maintain and educate their children to the best possible extent. (2) The parents' obligation referred to in paragraph (1) of this article shall be valid until the children marry or are independent, and shall continue to apply although the marriage of the parents has been dissolved."

[205] Art. 47 of MA 1974 *"(1) Anak yang belum mencapai umur delapan belas tahun atau belum pernah melangsungkan perkawinan ada di bawah kekuasaan orang tuanya selama mereka tidak dicabut dari*

Parents are forbidden to assign or to put any pledge over immovable assets of the children who are below eighteen years old or not yet married. They are allowed to do so only if the interest of their children requires them to do so.[206] In the event that either parent or both parents neglect their obligations to their children or they have a very bad behavior, the relevant district court may revoke the authority over their children, while they still have the obligation to provide alimentation to the respective children.[207]

MA 1974 considers the authority of parents as an individual right of each husband and wife. Therefore, in the event of divorce, both parents continue to have authority over the children and to take care of their children, based on the interest of the children. Parents' authority is not converted to be guardianship (*perwalian*). Any dispute between parents must be settled before a court. A father is responsible to give fund support to children. A court can decide that a mother participates in being responsible if a father fails to do so.[208]

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kekuasaannya. (2) Orang tua mewakili anak tersebut mengenai perbuatan hukum di dalam dan di luar Pengadilan." Translation: "(1) A child who has not reached the age of eighteen years old and has never held a marriage shall be in the custody of his/her parents insofar as they are not taken from their custody. (2) Parents shall represent the child in any legal actions inside and outside a Court."

[206] Art. 48 of MA 1974 "*Orang tua tidak diperbolehkan memindahkan hak atau menggadaikan barang-barang tetap yang dimiliki anaknya yang belum berumur delapan belas tahun atau belum melangsungkan perkawinan kecuali apabila kepentingan anak itu menghendakinya.*" Translation: "Parents may not transfer a right to or pledge immovable properties of their children who have not reached the age of eighteen years old or have never held a marriage, unless the interest of the child requires it."

[207] Art. 49 of MA 1974 "*(1) Salah seorang atau kedua orang tua dapat dicabut kekuasaannya terhadap seorang anak atau lebih untuk waktu yang tertentu atas permintaan orang tua yang lain, keluarga anak dalam garis lurus ke atas dan saudara kandung yang telah dewasa atau pejabat yang berwenang, dengan keputusan Pengadilan dalam hal: (a) ia sangat melalaikan kewajibannya terhadap anaknya; (b) ia berkelakuan buruk sekali. (2) Meskipun orang tua dicabut kekuasaannya mereka masih tetap berkewajiban untuk memberi biaya pemeliharaan kepada anak tersebut.*" Translation: "(1) The custody of one of or both parents may be revoked over one or more children for a certain period upon request of the other parent, family member of the children in a direct ascending lineage and adult siblings or authorized official, by a Judicial decision in the event that (a) they severely neglects their obligation to the children; (b) they extremely misbehave. (2) Although custody of parents is revoked, they shall still be obligated to provide maintenance expenses for the children."

[208] Art. 41 and 45 of MA 1974. Art. 41 of MA 1974 *"41. Akibat putusnya perkawinan karena perceraian ialah: (a) Baik ibu atau bapak tetap berkewajiban memelihara dan mendidik anak-anaknya semata-mata berdasarkan kepentingan anak; bilamana ada perselisihan mengenai penguasaan anak-anak, Pengadilan memberikan keputusannya; (b) Bapak yang bertanggungjawab atas semua biaya pemeliharaan dan pendidikan yang diperlukan anak itu; bilamana bapak dalam kenyataan tidak dapat memenuhi kewajiban tersebut, Pengadilan dapat menentukan bahwa ibu ikut memikul biaya tersebut; (c) Pengadilan dapat mewajibkan kepada bekas suami untuk memberikan biaya penghidupan dan/atau menentukan sesuatu kewajiban bagi bekas istri."* Translation: "41. The consequences of marriage dissolution shall be: (a) Either mother or father shall still be obligated to maintain and educate their children merely based on the children's interest; in case of dispute over the custody of children, a Court shall give its decision. (b) A father shall be responsible for all maintenance and education expenses required by the children; in the event that a father cannot actually fulfill the obligation, a Court may decide that the mother shall share such expenses; (c) A court may obligate a former husband to give living expenses and/or determine an obligation for a former wife."

According to BW, the legal relationship between a husband and wife with respect to their children initiates parents' authority over the children. Children who are born in a family are recognized as a legitimate descendant of such family. BW acknowledges that a descendant must have a blood tie between parents and children, either legal children or recognized illegitimate children. Parents' authority will end and will become guardianship in the event of divorce. It shows that parents' authority constitutes a collective right which follows the termination of a marriage.[209]

2.6.3 Marital Assets

Marital assets (*harta bersama*) constitute one of the legal consequences arising from a valid marriage. Assets between a man as the husband and woman as the wife are united into their marital assets, unless the couple have a marital agreement which will be discussed in the next sub-chapter. Assets belonging to a man becomes the assets of a woman as his wife, and vice versa. Part of MA 1974 for this case stipulates a bit differently from BW, as MA 1974 adopts the concept of marital assets from *Adat* Law.

MA 1974 states that assets acquired before a marriage remains belonging to each husband or wife. Particular gift and or inheritance from parents remain the property of the respective husband or wife. Marital assets are assets acquired by the respective couple as of the date of marriage and during their marriage.[210]

Art. 45 of MA 1974 "(1) Kedua orang tua wajib memelihara dan mendidik anak-anak mereka sebaik-baiknya. (2) Kewajiban orang tua yang dimaksud dalam ayat (1) pasal ini berlaku sampai anak itu kawin dan dapat berdiri sendiri, kewajiban mana berlaku terus meskipun perkawinan antara kedua orang tua putus." Translation: "(1) Both parents shall be obligated to maintain and educate their children to the best possible extent. (2) The parents' obligation referred to in paragraph (1) of this article shall be valid until the children marry or are independent, and shall continue to apply although the marriage of the parents has been dissolved."

[209] Art. 229 (1) of BW. *"Setelah memutuskan perceraian dan setelah mendengar atau memanggil dengan sah para orang tua atau keluarga sedarah atau semenda dari anak-anak yang di bawah umur, Pengadilan Negeri akan menetapkan siapa dari kedua orang tua yang akan melakukan perwalian atas tiap-tiap anak, kecuali jika kedua orang tua itu dipecat atau dilepaskan dari kekuasaan orang tua, dengan mengindahkan putusan-putusan hakim terdahulu yang mungkin memecat atau melepaskan mereka dari kekuasaan orang tua."* Translation: "After deciding on divorce and after hearing or validly summoning parents or consanguineal or affinal family members of minor children, a District Court shall determine who out of both parents will have guardianship or each child, unless both parents are dismissed or released from parents' custody, by considering the previous judge's decision which may dismiss or release them from parents' custody." In Dutch: "*Na het uitspreken der echtsheiding beslist de raad van justitie, na verhoor of hehoorlijke oproeping van de ouders en de bloedverwanten of aangehuwden der minderjarige kinderen, ten aanzien van ieder kind, wie der ouders, behoudens het geval dat deze beide van de ouderlijke magt zijn ontheven of onset, daarover de voogdij zal uitoefenen, met inachtneming van vroegere regterlijke uitspraken, waarbij zij van de ouderlijke magt mogten zijn ontheven of ontzet.*"

[210] Art. 35 of MA 1974. *"(1) Harta benda yang diperoleh selama perkawinan menjadi harta bersama. (2) Harta bawaan dari masing-masing suami dan istri dan harta benda yang diperoleh masing-masing sebagai hadiah atau warisan, adalah di bawah penguasaan masing-masing sepanjang para pihak tidak menentukan lain."* Translation: "(1) Assets acquired during a marriage shall be matrimonial assets. (2) Default assets of each

Ownership of marital assets and their previous assets (*harta bawaan*) influences the couple's authority to take any legal actions upon each respective asset. Any legal actions taken by a husband upon marital assets require the wife's approval, and vice versa. If a husband neglects this stipulation, such legal action can be annulled or cancelled due to lack of the husband's capacity. With respect to their previous assets, each husband or wife can decide for himself or herself, as he or she is authorized and is the sole owner of the respective assets.[211] This situation can be stated otherwise according to the consent of the husband and wife, which is described in a marital agreement, as discussed below.

In the event that a marriage is dissolved based on divorce, marital assets are divided between a husband and wife. The division of assets will be according to the prevailing rules applicable to the couple.[212]

MA 1974's stipulation is slightly different from BW. BW states that all of a husband and wife's assets acquired before and during their marriage are united into marital assets. Any exception is possible based on a marital agreement as stipulated thereof.[213]

In BW, a husband is entitled to maintain and manage common assets consisting of pre-marital assets and assets acquired during the marriage except for present, grant, or inheritance particularly given to a husband or wife personally.[214] A husband's authority

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husband and wife and assets acquired respectively as a gift or inheritance, shall be under the respective possession, insofar as the parties do not determine otherwise."

[211] Art. 36 of MA 1974. *"(1) Mengenai harta bersama, suami atau istri dapat bertindak atas persetujuan kedua belah pihak. (2) Mengenai harta bawaan, suami dan istri mempunyai hak sepenuhnya untuk melakukan perbuatan mengenai harta bendanya."* Translation: "(1) With respect to matrimonial assets, a husband or wife may act upon the approval of both parties. (2) With respect to default assets, a husband and wife shall have a full right to take actions on their assets."

[212] Art. 37 of MA 1974. *"Bila perkawinan putus karena perceraian harta bersama diatur menurut hukumnya masing-masing."* Translation: "In the event that a marriage is dissolved due to divorce, matrimonial assets shall be provided for according to the respective laws."

[213] Art. 119 of BW. "*Mulai saat perkawinan dilangsungkan, demi hukum berlakulah persatuan bulat antara harta kekayaan suami dan istri, sekadar mengenai itu dengan perjanjian kawin tidak diadakan ketentuan lain. Persatuan itu sepanjang perkawinan tak boleh ditiadakan atau diubah dengan sesuatu persetujuan antara suami dan istri.*" Translation: "From the moment of holding of the marriage, there shall exist by law unity of assets of a husband and wife, to the extent that no other stipulations have been made in a marital agreement. The unity may not be revoked or amended by a mutual agreement between a husband and wife for the duration of the marriage." In Dutch: *"Van het oogenblik der volterkking des huwelijks bestaat, van regtswege, algeheele gemeenschap van goederen tusschen de echtgebooten, voor zoo verre daromtrnt bij huwelijksche voorwaarden geene andere bepalingen gemakt zijn. De gemeenschap kan, staaande huwelijk, niet door onderlinge overeenkomst der echtgenooten worden opgeheven of gewijzigd."*

[214] Art. 108 of BW. "*Seorang istri, sekalipun ia kawin di luar harta bersama, atau dengan harta benda terpisah, tidak dapat menghibahkan, memindahtangankan, menggadaikan, memperoleh apa pun, baik secara cuma-cuma maupun dengan bebas, tanpa bantuan suami dalam akta atau izin tertulis. Sekalipun suami telah memberi kuasa kepada istrinya untuk membuat akta atau perjanjian tertentu, si istri tidaklah berwenang untuk menerima pembayaran apa pun, atau memberi pembebasan untuk itu tanpa izin tegas dari suami."* Translation:

is majority; however, management of a wife's assets must be conducted in good faith as a proper head of household, therefore he is responsible for any occurrence of negligence or failure.

The law regulates the possibility for a husband and wife to arrange a marital agreement as well as a mortgage on the husband's immovable assets in order to protect the wife's assets from any mismanagement. In addition, a wife has the opportunity to submit a claim to ask for the separation of assets in the event of any mismanagement of matrimonial assets.[215]

Abolishment of matrimonial assets is caused by the death of either husband or wife, a new marriage based on the approval of a court in the absence of a husband, and separation of tables and beds or any separation of assets.[216]

"A wife, although she marries beyond marital assets, or by separated assets, may not grant, assign, pledge, acquire anything, either without any cost or for free, without the assistance of the husband in a written deed or permit. Although the husband has authorized his wife to draw up a certain deed or agreement, the wife shall not be authorized to receive any payment, or provide any discharge thereof without any express permit of the husband." In Dutch: "*De vrouw, al is zij zelfs buiten gemeenschap van goederen getrouwd, of van goederen gescheiden, kan, zondaer bijstand van haren man in de acte, of zonder zijne schriftelijke toestemming, niets geven, vervreemden, verpanden, verkrijgen, het zij voor niet, het zij onder eenen bezwarenden titel. Indien de man zijne vrouw heeft gemagtigd om zekere acte of verbindtenis aan te gaan, is de vrouw daardoor niet geregtigd om, zonder uitdrukkelijke toestemming van de man, eenige betaling te ontvangen, of daarvoor kwijting te geven.*"

[215] Art. 114 of BW. *"Bila si suami, karena sedang tidak ada atau karena alasan-alasan lain, terhalang untuk membantu istrinya atau memberinya kuasa atau bila ia mempunyai kepentingan yang berlawanan, maka Pengadilan Negeri di tempat tinggal suami istri itu boleh memberikan wewenang kepada si istri untuk tampil ke muka Pengadilan, mengadakan perjanjian, melakukan pengurusan dan membuat akta-akta lain."* Translation: "In the event that the husband, due to absence or other reasons, is prevented from assisting his wife or giving her authority or if he has conflict of interests, a District Court at the domicile of the husband and wife may give authority to the wife to appear before the Court, to enter into an agreement, manage and draw up other deeds." In Dutch: *"Wanneer de man uit van afwezigheid of andere redenen wordt verhidere om zijne vrouw bij te staan of te magtigen, of een tegenstrijdig belang heeft, kan de raad van justitie van de woonplaats der echtgenooten haar de bovoegheid verleenen on in regten te verschijnen, verbindtenissen aan te gaan, beheer te voeren, en alle andere acten te verrigten."*

[216] Art. 126 of BW: *"Persatuan demi hukum bubar: (1) karena kematian; (2) karena berlangsungnya satu perkawinan atas izin Hakim, setelah adanya keadaan tak hadir si suami; (3) karena perceraian; (4) karena perpisahan tentang meja dan ranjang; (5) karena perpisahan harta benda. Akibat-akibat istimewa dari pembubaran-pembubaran dalam hal-hal tercantum pada no. 2, 3, 4 dan 5, pasal ini teratur dalam bab-bab yang membicarakan tentang hal-hal itu."* Translation: "Unity by law shall be dismissed due to the following: (1) death; (2) holding of a marriage with the permit of a Judge, following the absence of the husband; (3) divorce; (4) separation of table and bed; (5) separation of assets. Special causes of dismissal in cases set out in no. 2, 3, 4 and 5, of this article shall be regulated in chapters addressing those cases." In Dutch: *"De gemeenschap wordt van regtswege onbonden: (1) door den dood; (2) door het aangaan van een huwelijk, op verlof van den regter, na afwezigheid van den echtgenoot (Bw.493v); (3) door echtscheiding (Bw. 207v.); (4) door scheiding van tafel end bed (Bw.233v); (5) door scheiding van goederen (Bw.186v). De bijzondere gevolgen van de ontbinding, in de gevallen bij no. 2,3,4 en 5 van dit art. voorzien, zijn geregeld in de titels, welke over die onderwerpen handelen."*

2.6.3.1 Marital Agreement

A marital agreement is an exceptional condition to unify assets into matrimonial assets between a husband and wife, which is legally allowed by the law. This agreement makes assets between a husband and wife stay separated. Any assets belonging to a husband remain under the ownership of the husband and vice versa. There will be no marital assets between the spouses. To establish this condition, a husband and wife must conclude a marital agreement before or on the date of their marriage. A husband and wife must follow the requirements as referred to in MA 1974.

A marital agreement is stipulated in Art. 29 of MA 1974.[217] The article stipulates that before or on the date of marriage, a husband and wife may enter into an agreement in writing which should be legalized by a Registration Office's officer. The agreement can be made in an authentic notarial deed or privately executed agreement. Stipulation concluded by the parties in the respective agreement will also apply to any third parties. Such agreement will only be legalized if the provisions thereof do not contradict legal rules, religion and good moral (*kesusilaan*), and will directly be effective as of the date of marriage. Any amendment to a pre-marital agreement can be made based on consent of the husband and wife, provided it will not harm any third parties.

Pursuant to BW, a marital agreement is usually made in a notarial deed form. In practice, a notarial deed is aimed at avoiding any mistake or stipulation which can harm or even cancel this agreement.[218] Furthermore, a marital agreement will also be noted in the marriage certificate of the respective spouse. If such agreement is not legalized, it will have no legal binding enforcement to any third parties.

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[217] Art. 29 of MA 1974. *"(1) Pada waktu atau sebelum perkawinan dilangsungkan, kedua pihak atas persetujuan bersama dapat mengadakan perjanjian tertulis yang disahkan oleh Pegawai pencatat perkawinan, setelah mana isinya berlaku juga terhadap pihak ketiga sepanjang pihak ketiga tersangkut. (2) Perjanjian tersebut tidak dapat disahkan bilamana melanggar batas-batas hukum, agama dan kesusilaan. (3) Perjanjian tersebut mulai berlaku sejak perkawinan dilangsungkan. (4) Selama perkawinan berlangsung perjanjian tersebut tidak dapat diubah, kecuali bila dari kedua belah pihak ada persetujuan untuk mengubah dan perubahan tidak merugikan pihak ketiga."* Translation: "(1) At the time of or prior to a marriage, both parties upon mutual approval may enter into a written agreement legalized by a marriage registration Official, whereupon the content shall also apply to third parties insofar as such third parties are concerned. (2) The agreement may not be legalized if it violates the limits of law, religion and morality. (3) The agreement shall come into effect as of the holding of marriage. (4) During the marriage, the agreement may not be amended, except by mutual agreement of both parties to amend it and such amendment shall not prejudice any third parties."

[218] Art. 147 of BW. *"Perjanjian Kawin harus dibuat dengan akta notaris sebelum perkawinan berlangsung, dan akan menjadi batal bila tidak dibuat secara demikian. Perjanjian itu akan mulai berlaku pada saat perkawinan dilangsungkan, tidak boleh ditentukan saat lain untuk itu."* Translation: A Marital Agreement must be entered into by a notarial deed, prior to the holding of marriage, and shall be cancelled if it is not entered into in such a way. The agreement shall come into effect when the marriage is held, and such time may not be determined otherwise.

There is no specific or direct stipulation in MA 1974 regarding the scope of marital agreement. MA 1974 gives limitation of the scope of pre-marital agreement and a guideline by stating that the limitation of marital agreement are rules of law, religion and good morals.[219]

Some scholars are of the opinion that the scope of marital agreement is only for matrimonial assets of a husband and wife. This opinion is based on an argument that MA 1974 adopts the stipulation of this matter from BW. It clearly states that the scope of pre-marital agreement is only for matrimonial assets of a husband and wife.

A question follows the conclusion above whether or not a marital agreement can stipulate any other matters other than marital assets. The question is reasonable due to the comparison of structure of pre-marital asset stipulation of BW and MA 1974. Marital agreement provision in BW is placed after the rights and obligations of a husband and wife and unification of marital assets. While in MA 1974, marital agreement provision is placed preceding the chapter rights and obligations of a husband and wife and marital assets.

Some scholars stay to the opinion that the scope of marital agreement cannot extend beyond marital assets. This opinion considers the closed principle adhered in Book I of BW whereby the marriage law is placed within the family law. It contradicts Book III regarding Agreement and Obligation which adopts an Open principle. Therefore, if it is not stipulated in Book I, it cannot be interpreted otherwise or in the opposite way or stipulated according to the opinion of the parties (in this case a husband and wife) like any agreement in Book III of BW. This interpretation also applies to MA 1974.[220]

In relation to this subject, the author is of the opinion that MA 1974 gives a possibility for interpreting that a marital agreement can be more than marital assets. It provides that a marital agreement does not contradict law restrictions, religions and good morals. MA 1974 states its limitation in paragraph 2, and if a marital agreement can only provide matrimonial assets, it should be mentioned in such paragraph and this article should be in the chapter of marital assets. In addition, such understanding is stated in Decision of

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[219] Art. 29 (2) of MA 1974. *"Perjanjian tersebut tidak dapat disahkan bilamana melanggar batas-batas hukum, agama dan kesusilaan."* Translation (2) The agreement may not be legalized if it violates the limits of law, religion and morality.

[220] H.A. Damanhuri HR, *Segi-segi Hukum Perjanjian Perkawinan Harta Bersama (Legal Aspects of Marital Agreement on Matrimonial Assets)*, (Bandung: Publisher Mandar Maju, 2007), pp. 13-24. See also Wahyono Darmabrata, *Op.Cit.,* pp. 91-102.

the Constitutional Supreme Court No. 69/PUU-XIII/2015, issued in order to amend the stipulation of marital agreement,[221] as discussed below.

2.6.3.2 Decision of the Constitutional Supreme Court on Marital Agreement Provisions

On October 27, 2016, the Constitutional Supreme Court issued a decision which amends the occasion to conclude a marital agreement between spouses, namely decision of the Constitutional Supreme Court No. 69/PUU-XIII/2015 dated October 27, 2016.[222] Based on this decision, a marital agreement can be concluded before, on the date of or during a marriage.

This petition was submitted by a petitioner who complained to the Constitutional Supreme Court as she considered that she had been deprived of her constitutional right to hold the Right to Own (*Hak Milik*), and the Right to Build (*Hak Guna Bangunan*)[223]

[221] Decision of the Constitutional Supreme Court No. 69/PUU-XIII/2015 dated October 27, 2016, p. 154. *"…Perjanjian perkawinan ini mulai berlaku antara suami dan istri sejak perkawinan dilangsungkan. Isi yang diatur di dalam perjanjian perkawinan tergantung pada kesepakatan pihak-pihak calon suami dan istri, asal tidak bertentangan dengan Undang-undang, agama dan kepatutan atau kesusilaan. Adapun terhadap bentuk dan isi perjanjian perkawinan, kepada kedua belah pihak diberikan kebebasan atau kemerdekaan seluas-luasnya (sesuai dengan asas hukum "kebebasan berkontrak")"*

[222] Decision of the Constitutional Supreme Court No. 69/PUU-XIII/2015 dated October 27, 2016, available at www.mahkamahkonstitusi.go.id.

[223] The Right to Own (*Hak Milik*), Right to Cultivate (*Hak Guna Usaha*) or Right to Build (*Hak Guna Bangunan*) is stipulated in Art. 20-40 of the Basic Agrarian Law. The Right to Own (*Hak Milik*) is the inheritable right, the strongest and fullest right to land which one can hold. It is the right to own a plot of land and the owner could do anything on it with no time limit. The Right to Cultivate (*Hak Guna Usaha*) is a right to work on land directly controlled by the State for 25 or 35 years, which could be extended for another 25 years, for agriculture, fisheries or animal husbandry. The Right to Build (*Hak Guna Bangunan*) is a right to construct and possess buildings on land which is not one's own for a period of time at the maximum of 30 years. Only Indonesian citizens or Indonesian entities (in case of Right to Cultivate and Right to Build) can have these rights. In the event that the owner of such rights became a foreigner or have another nationality other than his or her Indonesian nationality, or if the Indonesian entity becomes a foreign entity for any reason, the owner within a year must transfer such plot of land to any other Indonesian citizen or Indonesian entity or such right will be released or terminated.

as the results of operation of Art. 21 (1) and (3) [224] and Article 36 (1)[225] of the Basic Agrarian Law, and Art. 29 (1), (3) and (4) and Art. 35 (1) of MA 1974.[226] The petitioner challenged the constitutionality of both legislations.

The petitioner is an Indonesian national who is married to a Japanese national. Unaware of the necessity of a pre-marital agreement to ensure her capacity to hold the Right to Own (*Hak Milik*), and the Right to Build (*Hak Guna Bangunan*), she paid a deposit for an apartment unit which carried the Right to Build (*Hak Guna Bangunan*). However, the purchase and sale agreement were terminated unilaterally by the developer based on Art. 36 (1) of the Basic Agrarian Law,[227] for her husband is a foreigner. Since she had not entered into a pre-marital agreement, her properties are automatically combined with her husband's assets and became marital assets. It will also be the case with her other properties obtained after her marriage according to Art. 35 of MA 1974. The District Court subsequently terminated the agreement, because the agreement did not fulfill the requirement of "lawful causes" described in Art. 1320 of BW.[228] In this case, the District

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[224] Art. 21 (1), (3) of the Basic Agrarian Law. *"(1) Hanya warga negara Indonesia dapat mempunyai hak milik. … (3) Orang asing yang sesudah berlakunya Undang-undang ini memperoleh hak milik karena pewarisan tanpa wasiat atau pencampuran harta karena perkawinan, demikian pula warga negara Indonesia yang mempunyai hak milik dan setelah berlakunya Undang-undang ini kehilangan kewarganegaraannya wajib melepaskan hak itu didalam jangka waktu satu tahun sejak diperolehnya hak tersebut atau hilangnya Kewarganegaraan itu. Jika sesudah jangka waktu tersebut lampau hak milik itu dilepaskan, maka hak tersebut hapus karena hukum dan tanahnya jatuh pada Negara, dengan ketentuan bahwa hak-hak pihak lain yang membebaninya tetap berlangsung."* Translation: "(1) Only an Indonesian citizen may have a right to own. … (3) A foreigner who following the coming into effect of this Law acquires a right to own due to inheritance without any will or asset combination due to a marriage, as well as an Indonesian citizen who holds a right to own and following the coming into effect of this Law loses his/her nationality shall be obligated to release such right within one year as of the acquisition of such right or loss of such nationality. If after the lapse of such period the right to own is released, such right shall be abolished by law and the land shall become the possession of the State, provided that rights of other parties which encumber it shall continue."

[225] Art. 36 (1) of the Basic Agrarian Law. *"(1) Yang dapat mempunyai hak guna bangunan ialah: (a) warga negara Indonesia; (b) badan hukum yang didirikan menurut hukum Indonesia dan berkedudukan di Indonesia."* Translation: "(1) Those who may hold a right to build shall be as follows: (a) Indonesian citizen; (b) legal entity incorporated under the laws of Indonesia and domiciled in Indonesia."

[226] Art. 19 of MA 1974 is stated in Footnote 164. Art. 36 (1) of MA 1974. "(1) Harta benda yang diperoleh selama perkawinan, menjadi harta bersama." Translation: "(1) Assets obtained during a marriage shall become matrimonial assets."

[227] Decision of the Constitutional Supreme Court No. 69/PUU-XIII/2015 dated October 27, 2016, pp. 5-7.

[228] *Ibid.* Art. 1320 of BW stipulates the requirements for validity of an agreement. It states that "*Supaya terjadi perjanjian yang sah, perlu dipenuhi empat syarat: (1) kesepakatan mereka yang mengikatkan dirinya; (2) kecakapan untuk membuat suatu perikatan; (3) suatu pokok persoalan tertentu; (4) suatu sebab yang tidak terlarang.*" Translation: "In order to be valid, an agreement must meet the following four conditions: (a) agreement of those who bind themselves; (2) capability to enter into a contract; (3) certain subject matters; and (4) lawful cause." In Dutch: *"Tot de bestaanbaarheid der overeenkoomsten worden vier voorwaarden vereisch:*

Court held that the agreement contradicts Art. 36 (1) of the Basic Agrarian Law, and therefore, it has unlawful causes, thus, it is null and void.

In the event of a marriage, according to Art. 35 of MA 1974 - assets between a husband and wife obtained during a marriage are combined into marital assets. Marital assets obtained during a marriage clearly belong to the respective husband and wife jointly. Therefore, in the event that an Indonesian husband or wife purchases or obtains a plot of land with the Right to Own (*Hak Milik*) or Right to Build (*Hak Guna Bangunan*) during a marriage, the foreign spouse also becomes the owner or holder of such plot of land by laws.

Any foreign national can only own a plot of land or property under certain requirements. If by any chance a foreign national owns a plot of land with the Right to Own (*Hak Milik*), he/she must assign it to a permitted party. According to Art. 21 (3) of the Basic Agrarian Law, in the event of marriage (or inheritance or any other causes) which causes the Right to Own (*Hak Milik*) is hold by any foreigner, the foreigner must transfer such right within a year to any other party who is an Indonesian national or Indonesian entity, qualified to hold such right under the Basic Agrarian Law. Alternatively, the foreigner must convert the Right to Own (*Hak Milik*) into the Right to Use (*Hak Pakai*), which is a significantly weaker title by the submission of application to the National Land Agency.

The process above also applies to the Right to Build (*Hak Guna Bangunan*).[229] The title must be assigned within a year to a party qualified to hold such right under the Basic Agrarian Law, or be converted into the Right to Use (*Hak Pakai*). Otherwise, the land will be forfeited to the state and the right shall be terminated by law.

To overcome the situation and to ensure continuous capacity to hold the Right to Own (*Hak Milik*) and the Right to Build (*Hak Guna Bangunan*), an international mixed

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(1) de toestemming van degenen die zich verbinded; (2) de bekwaamheid om eene verbindtenis aan te gaan; (3) een bepald onderwerp; (4) eene geoorloofde oorzaak."

[229] Art. 36 (2) of the Basic Agrarian Law. "*(2) Orang atau badan hukum yang mempunyai hak guna bangunan dan tidak lagi memenuhi syarat-syarat yang tersebut dalam ayat (1) pasal ini dalam jangka waktu 1 tahun wajib melepaskan atau mengalihkan hak itu kepada pihak lain yang memenuhi syarat. Ketentuan ini berlaku juga terhadap pihak yang memperoleh hak guna bangunan, jika ia tidak memenuhi syarat-syarat tersebut. Jika hak guna bangunan yang bersangkutan tidak dilepaskan atau dialihkan dalam jangka waktu tersebut, maka hak itu hapus karena hukum, dengan ketentuan, bahwa hak-hak pihak lain akan diindahkan, menurut ketentuan-ketentuan yang ditetapkan dengan Peraturan Pemerintah."* Translation: "(3) A person or legal entity which holds a right to build and no longer meet the conditions referred to in paragraph (1) of this article within 1 year shall be obligated to release or transfer such right to another party which meets the conditions. This provision shall also apply to a party which acquires a right to build, if it does not meet the conditions. In the event that the right to build concerned is not released or transferred within such period, such right shall be abolished by law, provided that rights of another party shall be considered, according to the provisions stipulated by a Government Regulation."

marriage couple usually enters into or concludes a marital agreement. This marital agreement makes an exception to the automatic combination of assets between a couple. Assets obtained after or during a marriage still belong to the respective husband or the wife. The Right to Own (*Hak Milik*) or the Right to Build (*Hak Guna Bangunan*) obtained by an Indonesian national will not automatically be combined into marital assets.

Art. 29 paragraph 1 of MA 1974 gives limitation that a marital agreement will only be concluded before or on the date of the marriage. Other than such period of time, a marital agreement shall be null and void. This stipulation prevents each international mixed marriage couple to enter into a marital agreement after or during a marriage. As a consequence, the absence of marital agreement causes a difficulty or even inability for Indonesian spouses to hold the Right to Own (*Hak Milik*) and/or the Right to Build (*Hak Guna Bangunan*).

This operation of law makes the petitioner requested the adjudication of stipulation toward discrimination and the right to live and have properties as described in Art. 28D (1), Art. 27 (1) Art. 28E (1), Art. 28H (1), (4) of the Indonesian Constitution.

After considering the arguments and also experts' opinion in the hearing, the judges drew conclusions and decisions. The judges partially refused the petitioner's petition since the judges could not find unconstitutionality in the articles of the Basic Agrarian Law in questioned and Art. 35 (1) of MA 1974. However, the judges found that Art. 29 (1), (3) (4) of MA 1974 is unconstitutional against the Indonesian Constitution.[230] Therefore, the judges gave new explanation and understanding upon the stipulation. Based on this decision of the Constitutional Supreme Court, Art. 29 of MA 1974 shall be understood as follows: *"(1) Pada waktu, sebelum dilangsungkan atau selama dalam ikatan perkawinan, kedua belah pihak atas persetujuan bersama dapat mengajukan perjanjian tertulis yang disahkan oleh pegawai pencatatan perkawinan atau notaris, setelah mana isinya berlaku juga terhadap pihak ketiga tersangkut. ... (3) Perjanjian Perkawinan tersebut berlaku sejak perkawinan dilangsungkan, kecuali ditentukan lain dalam Perjanjian Perkawinan. (4) Selama perkawinan berlangsung, perjanjian perkawinan dapat mengenai harta perkawinan atau perjanjian lainnya, tidak dapat diubah atau dicabut, kecuali bila dari kedua belah pihak ada persetujuan untuk mengubah atau mencabut, dan perubahan atau pencabutan itu tidak merugikan pihak ketiga."* Translation: "(1) At the time, prior to the course or during a marriage bond, both parties upon a mutual agreement may submit a written agreement approved by a marriage registration officer or notary, the contents of which thereafter shall also apply

[230] Decision of the Constitutional Supreme Court No. 69/PUU-XIII/2015 dated October 27, 2016, pp. 155-158.

to the third parties concerned. … (3) The Marital Agreement shall apply as of the course of marriage, unless otherwise determined in the Marital Agreement. (4) In the course of marriage, a marital agreement may provide for marital assets or other agreements, may not be amended or revoked, unless there is an agreement of both parties to amend or revoke, and such amendment or revocation shall not harm any third parties.

Based on the decision above, it is first confirmed that a Marital Agreement may be concluded after a marriage. Therefore, it should be called as a Marital Agreement, instead of a prenuptial agreement. A marital agreement shall be concluded with the same procedure, namely it has to be written, approved by a Notary and or Marriage Registration Officer. Furthermore, it has to be recorded in a marriage certificate. It is also confirmed that a Marital Agreement can cover marital assets and other agreements, insofar as it does not contradict or is not contrary with the law, religion and good morality. These conclusions distinguish a marital agreement in BW. BW strictly mentions that a marital agreement shall only be concluded before or at least on the date of marriage and the time period shall not be altered.

2.6.3.3 Promise to Marry (Janji Kawin)

The terminology "Promise to Marry" in English is relatively evident that it has an entirely different meaning and understanding of "Marital agreement". Each terminology is sufficiently clear and gives its own understanding, thus it is easy to distinguish one to the other. However, in Indonesian language, those terminologies or words are similar thus leading to misunderstanding that both terms are the same.[231] In fact, the meaning of each terminology and their legal consequences are different. A marital agreement is the agreement as described above, while a promise to marry is another concept which exists in the society and has other legal consequences.

MA 1974 does not stipulate a Promise to Marry, while BW recognizes it in Art. 58. BW states that a Promise to Marry is neither a ground for lawsuit for marriage solemnization nor any compensation, in terms of costs, damages and interests, due to the non-fulfilment of such promise. Such claim for compensation shall be deemed null and void.[232] A concept similar to a promise to marry can also be found in the Compilation

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[231] Wahyono Darmabrata, *Op.Cit.,* pp. 72-73*;* Ali Afandi, *Op.Cit.*, pp. 172-173; Martiman Prodjohamidjojo, *Op.Cit.,* p. 5. See comprehensive elaboration of Marital Agreement prior the decision of the Constitutional Supreme Court) in H.A. Damanhuri HR, *Segi-segi Hukum Perjanjian Perkawinan Harta Bersama (Legal Aspects of Marital Agreement on Matrimonial Assets)*, (Bandung: Publisher Mandar Maju, 2007).

[232] Art. 58 of BW. "*Janji kawin tidak menimbulkan hak menuntut dimuka Hakim berlangsungnya perkawinan, juga tidak menimbulkan hak untuk menuntut penggantian biaya, kerugian dan bunga, akibat tidak dipenuhinya janji itu, semua persetujuan untuk ganti rugi dalam hal ini adalah batal. Akan tetapi, jika pemberitahuan kawin ini telah diikuti oleh suatu pengumuman, maka hal itu dapat menjadi dasar untuk menuntut penggantian biaya, kerugian dan bunga berdasarkan kerugian-kerugian yang nyata diderita oleh satu*

of Islamic Laws (*Kompilasi Hukum Islam*) in Indonesia, the so-called "*peminangan*" or proposal.[233]

According to BW, if a Promise to Marry is followed by an official announcement by a Vital Records officer, such promise can be a ground for lawsuit in order to claim any compensation. The compensation is in the form of costs, damages and interests on actual material losses might be suffered by a party due to the refusal of fulfilment. It is prohibited from claiming any anticipated profits. Such claim lapses after the expiration of 18 months from the date of marriage announcement.

A similar concept is found in the Compilation of Islamic Laws, namely *peminangan.*[234] *Peminangan* means an activity or effort to have a man and woman marry, which is usually initiated by the family instead of the bride or groom themselves. *Peminangan* has no legal consequence and both parties are free to terminate the proposal.[235] The termination of *peminangan* should be conducted following a good procedure according to the religious value and local wisdom in the respective society, in order to keep and maintain the harmony and mutual respect between the parties.

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pihak atas barang-barangnya sebagai akibat dan penolakan pihak yang lain; dalam pada itu tidak boleh diperhitungkan soal kehilangan keuntungan. Tuntutan ini lewat waktu dengan lampaunya waktu 18 bulan, terhitung dari pengumuman perkawinan itu." Translation: "A promise to marry shall not give rise to any right to claim before a Judge for the holding of a marriage, nor give rise to any right to claim for cost reimbursement, loss and interest, due to the fulfilment of such promises, all approvals of damages in this case shall be cancelled. However, if this notification of marriage has been followed by an announcement, it may be a ground for claiming cost reimbursement, loss and interest based on actual losses suffered by a party to his/her assets as a result of refusal of the other party; in case of which loss of profit may not be taken into account. Such claim shall expire by the lapse of 18 months, as from such marriage announcement." In Dutch: *"Trouwbeloften geven geene regtsvordering tot het aangaan des huwelijks, noch tot vergoeding van kosten, schaden en interessen, uit hoofde der niet-vervulling van de beloften; alle bedingen tot schadeloosstelling te dezer zaken zij nietig. Wanneer echter de aangifte des huwelijks bij den ambtenaar van den burgerlijken stand van afkondiging gevolgd is, kan zulks grond opleveren tot het vorderen van vergoeding van kosten, schaden en interessen, uit hoofde der werkelijke verliezen, welke de eene partij door de weigering der andere, in hare goederen mogt hebben geleden, zonder dat daarbij eenige winstderving zal kunnen in aanmerking komen. Deze regtsvordering verjaart door verloop van achttien maanden, re rekenen van de huwelijks-afkondiging."*

[233] Wahyono Darmabrata, *Op.Cit.,* pp. 72-73; Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia, Antara Fiqh Munakahat dan Undang-undang Perkawinan (Islamic Marriage Law in Indonesia, Between Fiqh Munakahat and Marriage Law)* (Jakarta: Kencana, 2011), pp. 49-59.

[234] Art. 1 sub-article (a) of KHI. *"Peminangan ialah kegiatan upaya ke arah terjadinya hubungan perjodohan antara seorang pria dengan seorang wanita."* Translation: "Proposal shall be an endeavor toward the development of matchmaking relationship between a man and woman."

[235] Art. 74 of KHI. *"(1) Peminangan belum menimbulkan akibat hukum dan para pihak bebas memutuskan hubungan peminangan. (2) Kebebasan memutuskan hubungan peminangan dilakukan dengan tatacara yang baik sesuai dengan tuntunan agama dan kebiasaan setempat sehingga tetap terbina kerukunan dan saling menghargai."* Translation: "(1) A proposal shall not give rise any legal consequences and parties shall be free to terminate a proposal relationship. (2) The freedom to terminate a proposal relationship shall be performed by a proper procedure according to religious guidance and local customs thus harmony and mutual respect remain developed."

Both Promise to Marry and *peminangan* have no legal consequence. They differ in term of compensation. The compensation of a Promise to Marry is due if an official marriage announcement is already made by a Civil Registration officer. Compensation must be in the form of actual damage suffered by a party, while compensation for any anticipated profit is forbidden. Meanwhile in *Peminangan,* the compensation for termination is vague. The Compilation of Islamic Laws mentions that a termination must consider the religious value and local customs in order to maintain the harmony and respective society. This provision gives an opportunity to judges in a religious court *(Pengadilan Agama)* to cogitate the religious value and local customs if any compensation is claimed due to termination of *peminangan.*

MA 1974 is silent about a promise to marry. However, based on a decision of the Supreme Court, a Promise to Marry has been developed and can be concluded that it has legal consequences.[236] A defaulting party, who breaks a promise to marry, is stated to have committed a tort and therefore, he/she must pay compensation for the damage thereof.

These cases used to be brought before a criminal court, whereby a defaulting party is placed at the convicted seat and is sentenced to jail for a certain period of time. Men who (usually) give a promise to marry are found guilty based on the offense of fraud or deceit. Judges interestingly consider that the *Adat* Law as a living law in the society is an applicable law. For example, a Balinese judicial decision shows that judges gave their consideration to the action which is against the norms and religious value as well as the living law in the society where the couple lived. The action is known as the offense of, among others *Lokika Sanggraha* in Bali.[237]

Lokika Sanggraha is a relationship between an unmarried man and unmarried woman, involving pre-marital sexual intercourse based on a Promise to Marry, which is subsequently broken by either party intentionally. Judges stated that there is no offense in the Criminal Code which is equal to the offense in question. Therefore, judges

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[236] Decisions of the Supreme Court (from various sources): MARI No. 195.K/Kr/1978 dated October 8, 1978; MARI No. 666 K/Pid/1984 dated Feb 23, 1985; MARI No. 854.K/Pid/1983 dated October 30, 1984; PN Denpasar No. 104/PN.Dps/Pid 1980; PN Denpasar No. 2/Pid.B/1985/PN.Dps; PN Denpasar No. 25/Pid.B/1986/PN.Dps.; PN Klungkung No. 24/Pid/S/1992/PN.KLK; MARI No. 61.K/Pid/1988 dated March 15, 1990; MARI 1644 K/Pid/1988 dated May 15, 1991; MARI No. 3898 K/Pdt/1989 dated November 19, 1992; MARI No. 3101 K/Pdt/1984 dated February 8, 1989; MARI No. 522 K/Sip/1994; MARI No. 3277 K/Pdt/2000; MARI 3277 K/Pdt/2000 dated July 18, 2003; MARI No. 1398 K/Pdt/2005; MARI No. 1653 K/PDT/2010.

[237] Decisions of PN Denpasar No. 104/PN.Dps/Pid 1980; PN Denpasar No. 2/Pid.B/1985/PN.Dps; PN Denpasar No. 25/Pid.B/1986/PN.Dps.; PN Klungkung No. 24/Pid/S/1992/PN.KLK. See also Lilik Mulyadi, *Delik Adat "Lokika Sanggraha" di Bali,* Majalah Varia Peradilan, (Jakarta: Publisher IKAHI (Ikatan Hakim Indonesia): October 1987), pp. 164; Budi Suhariyanto, *Perlindungan Hukum Terhadap Korban Perzinahan (Legal Protection for Victims of Adultery)*, Widyariset, Vol.15 No. April 1, 2015, pp. 1-10.

considered *Lokika Sanggraha* of the *Adat* Law as a living law in the society. There are similar decisions made outside of Bali. One of them is a case whereby a man made a girl pregnant but refused to marry her. In the decision, the man was stated committing a violence according to the local *Adat* Law.[238] This case was heard in a criminal court, although in the *Adat* Law there is no clear distinction between the criminal law and civil law.[239] Similar offense with other terminologies can be found in another *Adat* society, for instance, *Adat Puala Maleu*.[240]

Decision of the Supreme Court No. 3191 K/Pdt/1984 dated February 8, 1989 becomes a landmark decision for these particular cases. This first decision of the Supreme Court on these particular cases states that breaking a promise to marry constitutes a tort; therefore, the defaulting party must pay compensation to the other party for any caused damage thereof.[241]

The case started when a woman asked a district court to declare a man, her ex-partner, to have committed a tort by breaking his promise to marry her while she has cohabited with him for a certain period of time. To ensure his promise to marry, the man handed over his savings book, official documents and a vehicle to the woman. The man promised to marry the defendant in a formal solemnization according to their religion and state law within 4 months, which never happened even though they have been together for more than a year.

This case was appealed to the High Court and finally to the Supreme Court. The Supreme Court judges waived the consideration of lower-level judges regarding Art. 58 of BW, and furthermore considered that Indonesia has a lot of kinds of *Adat* marriage, among others *Raksasa Wiwaha* which happened to the respective quarrelling couple. *Raksasa Wiwaha* marriage is known as a marriage whereby a couple run away from their parents and families to be together. A formal marriage solemnized upon the relationship between the couple would take place after the run-away-bride thought it is possible to do so. The Supreme Court considered that the man had committed a tort and violated the subjective right of the petitioner by declining the honor and reputation of

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[238] Decision of the Supreme Court No. 3898 K/Pdt/1989 dated November 19, 1992. See *Ibid.*

[239] The landmark case initiated similar cases to be treated as an *adat* criminal case. These cases show that *Adat* Criminal Law (still) lives in the society, in addition to becoming legal source and consideration of a judge's decision. This situation triggers arguments among scholars that *Adat* criminal law is a living law in the Indonesian society and suggests this kind of crime to be stipulated in the Bill of Criminal Law.

[240] Lilik Muyadi, *Eksistensi Hukum Pidana Adat di Indonesia: Pengkajian Asas, Norma, Teori, Praktik dan Prosedurnya (Existence of Adat Criminal Law in Indonesia: Assessment of Its Principle, Norm, Theory, Practice and Procedure),* Jurnal Hukum dan Peradilan, Col.2 No. July 2, 2013, pp. 225-246.

[241] Paulus Effendie Lotulung, *Peranan Yurisprudensi sebagai Sumber Hukum (The Role of Jurisprudence as a Legal Source)* (Jakarta: Badan Pembinaan Hukum Nasional, Department of Justice, 1997/1998), pp. 39-48.

the petitioner as a teacher. This conduct contradicts morality as the norms.[242] Furthermore, the Supreme Court judges ordered him to pay compensation of vindication to the defendant while refused the petition of the petitioner for expenses during their cohabitation since the defendant had not given such promise.

This decision of the Supreme Court becomes a landmark decision of the broken promise to marry. Such conduct from the defaulting party is stated as a tort for it contradicts morality (*kesusilaan*) in the society. This consideration is repeated in several decisions in similar cases.[243] Therefore, it can be concluded that a Promise to Marry has legal consequences as it contradicts the *Adat* Law, good morals and norms, which live in the society. As a tort, the defaulting party must pay any vindication compensation to the party who bears any damage thereof.

3 One of the Resources of Indonesian Marriage Law: *Adat* Law

The situation above shows that *Adat* law fills and settles the cases while MA 1974 is silent. It shows that the *Adat* Law still has an important position in the Indonesian legal system, in this case as one of the legal sources. The *Adat* Law has a long history in Indonesia and its indigenous people have and live in their own legal system, even before foreigners arrived in Indonesia. Thus, this paragraph will show that the *Adat* Law still applies in the field of marriage, even after the promulgation of MA 1974.

The terminology *Adat* Law was introduced by Snouck Hurgronje, an oriental expert from the Netherlands.[244] The *Adat* Laws derives from *adat-istiadat* (the plural form of

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[242] See Decision of the Supreme Court No. 3898 K/Pdt/1989 dated November 19, 1992, *"… termohon kasasi telah melanggar hak subyektif orang lain, menjatuhkan kehormatan dan nama baik, sebagai seorang guru, dan bertentangan dengan kesusilaan sebagai norma moral …"*

[243] See Decisions of the Supreme Court MARI No. 522 K/Sip/1994; MARI No. 3277 K/Pdt/2000; MARI 3277 K/Pdt/2000 dated 18 July 2003; MARI No. 1398 K/Pdt/2005; MARI No. 1653 K/PDT/2010.

[244] *Adat* Law or *Adatrecht* or *Hukum Adat* was used officially in laws and regulations in 1929. However, before that, the terminology *Adat* Law or other terminologies were already used to show the existence of *Adat* Law. In 1747, when VOC was in Indonesia, in *Landraad* applied in Semarang the terminology *"…Undang-undang Jawa sejauh dapat kita terima…" ("…de Javaanse wetten, voorzover ze bij ons tollerbel zijn…")* was used. In 1754, William Marsden in Sumatera used the terminology "customs of the country" and "customs and manners of the native inhabitants". In 1804, the Charter Nederburgh used the terminology "laws and their customs" ("*zijn wetten en gewoonten*"). In 1825, State Gazette No. 42 used the terminology "indigenous and religion's law" (*"Inlandse of godsdienstige wetten"*). In 1848, when Mr. H.L. Wichers was the Chairman of the Supreme Court of the Netherlands, he used the terminology "religion's law or good morals and ancestor or hereditary customs" (*"godsdienstige wetten of de zeden en oude herkomsten"*). In 1854, *Regerings-Reglement* (abbreviated as the "RR") used the terminology "religion's law, regulations, institutions and customs of folks" ("godsdienstige wetten, volksinstellingen en gebruiken"). In 1920, RR used the terminology "law and regulations apply amongst them which closed with their religions and customs" (*"de onder hen geldende met hun godsdiensten en gewoonten samenhangende rechtsregelen"*). In 1929, art. 134 (2) of *Indische Staatsregeling* (abbreviated as the "IS") used the terminology *Adat* Law (*"Adatrecht"*). The previous terminologies show the existence of *Adat* Law as an applicable law and living law amongst the folk, even before the Dutch came for the first time in 1596.

"*Adat*"). It constitutes social norms issued and maintained by the legal functionaries or authorized officials of the respective society. The *Adat* Law regulates legal relationships within the society.[245] The *Adat* Law is established from sacred norms (*nilai-nilai sakral*), including religious norms. Those provisions indicate that the *Adat* Law has sanctions in the event of any violations.

The *Adat* Law is mentioned in regulations as an un-statutory law and is interpreted as a genuine law of the Indonesian community, as it roots from traditional customs and radiance of Indonesian basic cultures. It binds and defines the thoughts and convictions of Indonesian people.[246] However, not every *Adat* constitutes an *Adat* Law, as only *Adat* with legal sanctions constitutes an *Adat* law.[247] Some scholars state that the *Adat* Law does not recognize any modification,[248] and it cannot be considered as merely a Customary Law.[249]

Nusantara was not and empty-law state, *Adat* Law was already there and was applied. See Soerojo Wignjodipoero, *Pengantar dan Asas-asas Hukum Adat (Introduction and Principles of Adat Law),* (Jakarta: Toko Gunung Agung, 1995), pp. 27-28.

[245] See also Soepomo who also has the same opinion that *Adat* Law is an unwritten law, maintained by legal functionaries and contained sanctions which has a religious aspect.

[246] Moh. Koesnoe, *Hukum Adat Sebagai Suatu Model Hukum: Bagian I (Historis) (Adat Law as a Legal Model: Part 1 (History))*, (Bandung: Mandar Maju, 1992), p. 24.

[247] Van Vollenhoven, *Het Adatrecht van Nederlandsch Indie,* Jilid II, Leiden, 1928, p. 398. "*… dikatakan hukum karena bersanksi, dikatakan adat karena tidak termodifikasi. …*" in H. Hilman Hadikusuma, *Hukum Perkawinan Indonesia menurut Perundangan, Hukum Adat, Hukum Agama,* (Bandung: Mandar Maju, 1990), p. 14.

[248] Moh. Koesnoe, *Op.Cit.*, p. 8.

[249] R Otje Salman Soemadiningrat, *Rekonseptualisasi Hukum Adat Kontemporer (Reconceptualization of Contemporary Adat Law)* (Bandung: Alumni, 2002)*,* pp. 11-14. R. Otje Salman Soemadiningrat quoted Bagir Manan to confirm the distinction of Customary Law and *Adat* Law. See Bagir Manan *Konvensi Ketatanegaraan* (Constitutional Convention)*,* (Bandung: Armico, 1987), pp. 18-27. Repetition from the head of community about the *Adat* Law principles to a particular case does not make *Adat* Law become equal to the Customary Law. The Customary Law is indeed a repeated action the so-called habit or custom (*gewoonte*) and then, it is perceived as an action that should be done by all members of the community. A custom will have a legal nature if such custom is considered as an obligation which requires obedience of every member of the community. This obligation arises from the confirmation of the head of community or in the modern society known as the general opinion, jurisprudence or doctrine. R. Otje Salman agrees with the opinion of Soerjono and further concludes that the custom law has its own characteristics. See further R. Otje Salman Soemadiningrat, *Pelaksanaan Hukum Waris di Daerah Cirebon Dilihat dari Hukum Waris Adat dan Hukum Waris Islam (Implementation of Inheritance Law in Cirebon Perceived from the Adat Inheritance Law and Islamic Inheritance Law),* Dissertation, (Bandung: PPS Unpad, 1992), p. 18. See also *Ibid* for another examples, among others, Customary Law is revealed from contact with foreign aspects were the establishment of *titisara* land ("*pembentukan tanah titisara*") in Cirebon, the cattle raised in Kuningan (West Java) called the "ala gaduh". The owner is entitled to two-thirds of the result of cattle, while the rest is the right of the keeper. Another example is in the field of constitutional field. It is the presidential speech of the President of Indonesia every 16 August before the Council. No regulation states such speech as an obligation. However, since the President of Indonesia always presents such speech every 16 August since Soeharto's era, it becomes an obligation. Another example can be seen further in Otje Salman, *ibid.* There are

In the *Adat* Law, a person is considered as the holder of rights and obligations united in his/her community and subject to its domination. The *Adat* Law provides the stipulation of persons and their community as a unit, integrated and inseparable of each other. Such character indicates that public interest is more significant than personal interest. The person is known as a subject to serve public interest. Therefore, it is known that the primary purpose of the *Adat* Law is to reach harmony between persons and the community.[250]

The *Adat* Law does not recognize any separation of law as in BW, namely the civil law and criminal law. Any legal action categorized as a criminal law will fall under the "*Hukum Adat Delik*".[251] In fact, nowadays, the *Adat* law practically remains effective in the field of civil law only.[252] The *Adat* law remains as a unique pattern for Indonesian laws. Particularly in the family law, the *Adat* Law stays as a living law and is effective in the society. Therefore, the *Adat* Law as an un-written living law in the Indonesian society will stay as a source of law for any matter, not stipulated yet in the legislation.[253]

3.1 *Adat* Law in Prevailing Rules and Regulations

The Indonesian Constitution explicitly recognizes and acknowledges the rights of indigenous people and their traditional rights or *Adat* rights. The State acknowledges and respects each unit of *Adat* law society and its traditional rights, provided that such *Adat* law lives well and effectively in the society.[254]

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three requirements to affirm a habit or custom as a law. First, the society has to belief that the conduct of such things is obligatory (*beseef van behoren*). Second, there are acknowledgement and faith that the habit or custom is binding in nature meaning that it is an obligation to obey the so-called principle of *opinio necessitas*. Third, there is a confirmation by means of acknowledgement (*erkenning*) and/or ratification (*bekrachtiging*) from an authorized forum (or general opinion, jurisprudence or doctrine) which raise a hope to impose a sanction in any event of violation. The custom law is formed primary as a result of contact of civilization.

[250] *Ibid*., pp. 8-9. See also Soepomo in his inauguration speech as Professor of *Adat* Law at Rechtshooge School Batavia on March 31, 1941, *De Verhouding van Individu en Gemenschap in het Adatrecht,* (Batavia: JB Wolters, 1941) translated by himself in Soepomo, *Hubungan Individu dan Masyarakat dalam Hukum Adat* (translation: Relationship of Individual and Society in *Adat* Law) (Jakarta: Pradnya Paramita, 1951), pp. 10-12.

[251] R. Otje Salman Soemanidingrat, *Op.Cit.*, p. 19.

[252] Soerojo Wignjodipoero, *Pengantar dan Asas-asas Hukum Adat* (translation: Introduction and Principles of *Adat* Law)*,* (Jakarta: Toko Gunung Agung, 1995), p. 35.

[253] Prof. Soepomo in speech of Dies Natalies in Universitas Gajah Mada, Yogyakarta on March 17, 1947. See also R. Otje Salman Soemadiningrat, Op. Cit., pp. 212-216.

[254] Art. 18B. *"(1) Negara mengakui dan menghormati satuan-satuan pemerintah daerah yang bersifat khusus atau bersifat istimewa yang diatur dengan undang-undang. (2) Negara mengakui dan menghormati kesatuan-kesatuan masyarakat hukum adat beserta hak-hak tradisionalnya sepanjang masih hidup dan sesuai dengan perkembangan masyarakat dan prinsip Negara Kesatuan Republik Indonesia yang diatur dalam Undang-undang."* Translation: "(1) The state shall recognize and respect special and distinct regional government units which are regulated by laws. (2) The State shall recognize and respect *adat* law society units along with their

In the history of laws and regulations, the *Adat* Law made its milestone at the promulgation of the Agrarian Law in 1960 (the "**Basic Agrarian Law**").[255] The Basic Agrarian Law states that Indonesian nationals' agrarian law shall be based on the *Adat* Law, provided that it does not contradict the national interest of the state, and other prevailing laws and regulations.[256]

Recognition of the *Adat* law continues to survive nowadays. The *Adat* law is mentioned in several laws and regulations, among others in the Regional Government Law[257], the Human Rights Law[258], and the Forestry Law[259]. Those articles mention that the State recognizes and respects each unit of *Adat* Law Society including the *Adat* Law which

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rights provided that they still live and are in accordance with the development of the society and principle of the Unitary State of the Republic of Indonesia which are regulated by laws."

[255] Law No. 5 of 1960 regarding the Basic Agrarian Law, dated September 24, 1960, State Gazette No. 104 of 1960, Supplement No. 2043. R. Otje Salman Sumadiningrat, *Op.Cit.,* pp. 160-165.

[256] Art. 5 of the Basic Agrarian law. *"Hukum Agraria yang berlaku atas bumi, air dan ruang angkasa ialah Hukum Adat, sepanjang tidak bertentangan dengan kepentingan nasional dan Negara; yang berdasarkan atas persatuan bangsa, sosialisme Indonesia; serta dengan peraturan-peraturan yang tercantum dalam Undang-undang ini dan peraturan perundang-undangan lainnya; segala sesuatu dengan mengindahkan unsur-unsur yang bersandar pada hukum agama."* Translation: "The agrarian law applicable to land, water and airspace shall be *Adat* Law, provided that it does not contradict the national interest and the State; which based on national unity, Indonesian socialism, as well as by provisions set out in this Law and other laws and regulations; everything by considering elements relying on the religious law."

[257] Art. 2(9), Art. 203 (3) of Law No. 32 of 2004 regarding Regional Governance, October 15, 2004, State Gazette No. 125 of 2004, Supplement No. 4437, as amended by Government Regulation in Lieu of Law No. 3 of 2005 regarding the Amendment to Law No. 23 of 2004 regarding Regional Governance, dated April 27, 2005, State Gazette No. 38 of 2005, Supplement No. 4493. Art. 2 (9): "*(9) Negara mengakui dan menghormati kesatuan-kesatuan masyarakat hukum adat beserta hak tradisionalnya sepanjang masih hidup dan sesuai dengan perkembangan masyarakat dan prinsip Negara Kesatuan Republik Indonesia*." Translation: "(9) The State shall recognize and respect *adat* law society units along with their traditional rights insofar as they still live and are in accordance with the development of the community and principles of the Unitary State of the Republic of Indonesia."

[258] Art. 6 of Law No. 39 of 1999 regarding Human Rights. *"(1) Dalam rangka penegakkan hak asasi manusia, perbedaan dan kebutuhan dalam masyarakat hukum adat harus diperhatikan dan dilindungi oleh hukum, masyarakat dan pemerintah. (2) Identitas budaya masyarakat hukum adat, termasuk hak atas tanah ulayat dilindungi, selaras dengan perkembangan jaman."* Translation: "(1) In the context of enforcement of human rights, differences and needs in *Adat* Law society must be taken into account and protected by the laws, community and government. (2) The cultural identity of *Adat* Law society, including the right to *ulayat* land (*Adat* land), shall be protected in line with the current development."

[259] Art. 67 (1) of Law No. 41 of 1999 regarding Forestry. *"(1) Masyarakat hukum adat sepanjang menurut kenyataannya masih ada dan diakui keberadaannya berhak: (a) melakukan pemungutan hasil hutan untuk pemenuhan kebutuhan hidup sehari-hari masyarakat adat yang bersangkutan; (b) melakukan kegiatan pengelolaan hutan berdasarkan hukum adat yang berlaku dan tidak bertentangan dengan undang-undang; dan (c) mendapatkan pemberdayaan dalam rangka meningkatkan kesejahteraannya."* Translation: "(1) *Adat* Law society insofar as according to facts it remains in existence and is recognized, shall be entitled to: (a) collect forest products for the fulfillment of daily basic needs of the *adat* society concerned; (b) conduct forest management activities based on the prevailing *adat* Law and not contradicting the laws; and (c) being empowered in order to improve their welfare."

lives in it as long as it is in line with the development of the society and basic principles of Indonesian regulations. Moreover, *Adat* Law Society is acknowledged as a legal person who has a legal standing to submit any claim to the Constitutional Court.[260] In addition to the prevailing laws and regulations, *Adat* Law is revealed in decisions of the Supreme Court as referred to in the previous sub-chapter, as well as in textbooks as a result of academic research.[261]

3.2 *Adat* Marriage Law and Its Position

In the *Adat* Law, a marriage is an *Adat* engagement, which is more than a civil engagement or a relationship between a husband and wife. An *Adat* engagement includes the engagement of kinship and neighborhood.[262] This marriage has broader legal consequences since it covers not only the rights and obligations between a husband and wife, common assets and status of children. It also covers the family and kinship as well as neighborhood related to *Adat* religious ceremony(ies), including the obligation to obey commands and prohibitions related to either the inter-personal relationship in the society or relationship with their God(s). Ter Haar concludes that a marriage in the *Adat* Law concerns about family, kinship, society, personal and spiritual affairs,[263] while

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[260] Art. 51 (1) (b) of Law No. 24 of 2003 regarding the Constitutional Supreme Court. *"(1) Pemohon adalah pihak yang menganggap hak dan/atau kewenangan konstitusionalnya dirugikan oleh berlakunya Undang-undang, yaitu: … (b) Kesatuan masyarakat hukum adat sepanjang masih hidup dan sesuai dengan perkembangan masyarakat adat dan prinsip Negara Kesatuan Republik Indonesia yang diatur dalam Undang-undang. …"* Translation: " (1) A petitioner shall be a party who considers its constitutional right and/or authority is prejudiced by the coming into effect of Law, namely: … (b) *Adat* law society unit insofar as it still lives and is in accordance with the development of the *Adat* society and principles of the Unitary State of the Republic of Indonesia which are regulated in the Law.." See also Art. 3 of Regulation of the Constitutional Supreme Court No. 06/PMK/2005 regarding Proceeding in Judicial Review Cases *(Pedoman Beracara dalam Perkara Pengujian Undang-undang)*.

[261] For instance, a book of Prof Supomo titled *"Hukum Perdata Adat Jawa Barat"* (translation: *Adat* Civil Law of West Java), or of Prof. Djojodigoeno and Tirtawinata titled "*Hukum Perdata Adat Jawa Tengah*" (translation: *Adat* Civil law of Central Java) as a result of their academic researches. Subekti in the book "*Hukum Adat Indonesia dalam Yurisprudensi Mahkamah Agung*" (translation: Indonesian *Adat* Law in Jurisprudence of the Supreme Court). See also writings about *Adat Law* recently, among others, Dominikus Rato, *Hukum Adat Kontemporer (Contemporary* Adat *Law),* Surabaya: LaksBang Justisia, 2015); articles in Journal of Indonesian *Adat* Law first published in December 2017 managed by the Association of Indonesian *Adat* Law Lectures.

[262] *… perkawinan bukan saja berarti perikatan perdata, namun juga berarti perikatan adat dan sekaligus perikatan kekerabatan dan ketetanggaan….*, (translation: … marriage does not only means a civil engagement, but it also means *adat* engagement and also kinship and neighborhood engagement) further see Hilman Hadikusuma, *Hukum Perkawinan Indonesia menurut Perundangan, Hukum Adat, Hukum Agama,* (Bandung: Mandar Maju, 1990), p. 8. See the same idea and principles that *Adat* Marriage is important for extended family and kinship. In particular places, a marriage is also important for the ancestors of both parties. Therefore, ceremony of *Adat* Marriage is usually accompanied by offerings to them. See Soerojo Wignjodipoero, *Pengantar dan Asas-asas Hukum Adat* (translation: Introduction and Principles of *Adat* Law), (Jakarta: Toko Gunung Agung, 1995), p. 122.

[263] Ter Haar, *Beginselen en Stelsel van het Adatrecht,* (Jakarta: JB Wolters-Groningen, 1950), p. 158.

Van Vollenhoven states the same idea by uttering that in the *Adat* Law, legal institutions and norms are associated with the world outside and beyond human ability (*hoogere wereldorde*).[264]

A marriage in term of the *Adat* Law has certain legal consequences applicable to the respective society. These legal consequences may occur before a marriage, such as the proposal of marriage, which forms a relationship between the prospective couple (*rasan anak*) and the prospective parents (*rasan tuha*)[265]. Other legal consequences arise after a marriage, such as the rights and obligations of parents in the *Adat* ceremony(ies) and furthermore to participate actively in supporting and maintaining harmony and integrity, as well as the constancy of marriage life of their children.[266] Therefore, a marriage in the *Adat* law is related to the extended family or kinship, not merely the relevant couple.[267] A marriage is an assessment to carry descendants, to maintain the lineage or family tree and social position in the relevant society. In addition, in certain occasions, a marriage may be used to relieve or develop kinship which has been broken or shattered and is related to the position of inheritance and assets.

The discussion above shows that a marriage according to the *Adat* Law has broad aspects. Therefore, the execution of a ceremonial marriage of couples who are either young or even adults, must be interfered by their parents and kin. This scope is broader than a marriage as stipulated in MA 1974 or BW.

3.2.1 Marriage with or without Engagement

An *Adat* marriage may begin with or without engagement. An engagement is a particular circumstance which precedes a matrimonial ceremony. In this circumstance, consent between two families of the bride and groom is based on a proposal of marriage from the groom and or his family to the bride and or her family.

An engagement is binding when a groom gives a present as a symbol of engagement.[268] The symbol can be given to the bride's family or parents or to the bride herself. In some

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[264] *Ibid.* p. 9.

[265] *Ibid.*

[266] *Ibid*.

[267] *Adat* marriage is slightly different from a marriage nowadays whereby a marriage is merely a relationship between the couple and or family of the couples. See Van Dijk, *Pengantar Hukum Adat Indonesia* (translation: Introduction to Indonesian *Adat* Law)*,* translated into Indonesian Language by A. Soehardi W.V, (Bandung: Hoeve Bandung s'Gravenhage, 1954) p. 34.

[268] Sign of engagement is called as *panjer* or *peningset* in Java, *panyancang* in Pasundan (west Java), *tanda kong narit* in Aceh, *bobo mibu* in Nias Island, *sesere* in Mentawai Islands, *passikog* in South Sulawesi, *tapu*

places, the symbol may be given vice versa or in the form of gift exchange. Nowadays, a groom gives a ring as a symbol of engagement.[269]

Cancellation may happen at a very utmost coincidence. Mutual consent between the couple can be the reason for cancellation, even after a certain or long period of time. Cancellation by either party can also happen. If a bride cancels the engagement, she is obligated to return all gifts, in some circumstances with cancellation consequences. If a groom cancels it, he must leave the presents to the bride. He has no right to request the bride to return the present. If cancellation is based on mutual consent, present must be given or returned by each party. [270]

A marriage without any proposal or engagement is usually called as runaway marriage or "*kawin lari*".[271] Each territory has its own name or terminology. This type of marriage is usually found in patrilineal marriages and is less in matrilineal marriages. This kind of marriage usually happens because parents of either or both parties do not agree with the marriage. In some territories, the reason is to waive any obligation of dowry payment or any other obligation which comes along with a marriage proposal or engagement. Runaway marriage happens when a groom and bride depart from their parents' house to their relative or elder to obtain temporary protection. From there and with the assistance of relatives or elders, they have a simple matrimonial marriage.[272]

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in Halmahera, *mas aye* in Mei Islands, *pujompo* in Toraja, *paweweh* in Bali. Soerodjo Wignjodipoero, *Op.Cit.*, p. 124.

[269] *Ibid.,* p. 125. Background of engagement in every place is different. Usually, engagement is about to ensure that a marriage between a couple will happen soon or in the near future. In some places, engagement limits intercommunication or interaction of the prospective bride and groom with others. Engagement also gives an opportunity for the couple to know each other better, therefore in their marriage, they can become a good couple.

[270] *Ibid.*

[271] Ter Haar refers this kind of marriage as "*wegloophuwelijk*" or "*vluchthuwelijk*", in particular cases as "*schaakhuwelijk*". See also Sution Usman Adji, *Kawin Lari dan Kawin antar Agama (Run-away Marriage and Inter-religion Marriage)*, (Yogyakarta, Liberty, 1989), pp. 105-107.

[272] Soerojo Wignjodipoero, *Op. Cit.,* p. 127. Payment of dowry or engagement costs some funds which sometimes may be too much to bear for grooms. For a moment or two, it becomes a polite way to refuse a marriage proposal from the bride's family even though the bride is in love with the groom. Another reason is to avoid or reduce the involvement of parents or family. If a bride is engaged to another man, the groom must pay compensation to that man and his family. In Bali and Lampung, this kind of marriage is called as "*perkawinan rangkat*", whereby a groom kidnaps a bride (without any consent from her or with coercion). In this case, a groom is obligated to pay to the bride's family compensation, expenses of matrimonial ceremony, and dowry which is usually higher than the ordinary dowry. *Perkawinan rangkat* can also be found in North Sulawesi. However, this marriage is slightly different from the same *perkawinan rangkat* in Bali and Lampung, although it has a similar name. *Perkawinan rangkat* in North Sulawesi includes run-away marriage and kidnapped marriage. This kind of marriage usually faces difficult acceptance from the bride's family. The *Adat* Law used to give a right to assassinate the groom if he does kidnap the bride. See also Sution Usman Adji, *Op.Cit.*, pp. 105-111.

3.2.2 *Adat* Marriage Law according to the Family System

According to the *Adat* Law, there are three family systems or kinship family systems[273], namely paternal (*patriarchaat, vaderrechtelijk*), maternal (*matriarchaat*, *moederrechtelijk*), paternal-maternal (*parenteel*, *ouderrechtelijk*).[274] Slightly different from the division above, Otje Salman mentions that a kinship system in an *Adat* society is based on genealogies divided into four categories namely patrilineal system, matrilineal system, parental or liberal system or bilateral descent, and alternated system.[275] However, in relation to marriage issues particularly the marriage system, the parental system and alternated system have almost the same provisions, therefore the discussion will be focused on the first three systems. In addition, it is also important to state here that if an *Adat* society applies a parental system, it does not mean it will be the same with other *Adat* societies, which apply the same system since there is no identical pattern in the *Adat* Law system. Similarity is possible but it will not exactly be the same.

Family systems stipulated in *Adat* kinship affect *Adat* marriage law in Indonesia. In a patrilineal system, a marriage will be according to the so-called "*Perkawinan Jujur*", while a maternal system marriage will be according to "*Perkawinan Semenda*" and the third marriage is in the Parental system according to the "*mencar*" or "*mentas*". Therefore, an *Adat* Law Marriage can be divided into three categories.[276]

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[273] Hilman Hadikusuma uses the legal terminology "*kekerabatan Adat*" to show the character of *adat* law in a family legal system (*familierecht*) which includes the marriage law, parents' authority over their children as well as adopted children, and another marriage matters. The family law is divided from the personal law or status (*personenrecht*) which includes legal capacity (*rechtsbevoegheid*) and authority to take any legal actions (*handelingensbevogheid*) of a person including any matters which influence such capacity, for instance age, sex, nationality, etc. The *Adat* Law, with its communal character, stipulates that a person as a legal subject shall be bound by his position as a family member which is subject to their kinship. Suffice it to say that *Adat* Kinship ("*Kekerabatan Adat*") also includes a relationship between parents and nieces and nephews, nieces and nephews with their family from the side of their mother or father, even with the extended family. See Hilman Hadi Kusumah, *Pokok-pokok Pengertian Hukum Adat*, (Bandung: Alumni, 1980), p. 140. While Ter Haar uses the terminology "*Kesanaksaudaraan*" *(verwanschapsrecht)* to include a relationship between children and their parents, relationship of children with their extended family, maintenance of orphans and adoption. Ter Haar. *Op. Cit.*, p. 171. In this section, the terminologies "*kekerabatan adat*" and "*Kesanaksaudaraan*" are considered the same because it includes the same scope.

[274] *Idem*.

[275] Soerjono Soekanto and Soleman B. Tabeko, as quoted by Otje Salman Soemadiningrat, *Rekonseptualisasi Hukum Adat Kontemporer,* Op.Clt., pp. 45-46.

[276] Sution Usman Adji, *Op. Cit.*, pp. 73-93. According to him, an *Adat* Marriage has two types of dowry payment. Based on the process, a marriage is divided into three types, namely ordinary marriage (*perkawinan pinang* or *aanzoek huwelijk*), runaway marriage (*perkawinan lari bersama* or *vlucht of welloop huwelijk*) and kidnapped marriage (*perkawinan bawa lari* or *schak huwelijk*). A marriage based on dowry payment has several methods (a) patrilineal marriage and matrilineal marriage, (b) *jujur* marriage by adopted marriage (*perkawinan*

3.2.2.1 Jujur Marriage

Perkawinan Jujur or a marriage with *jujur* settlement occurs in a patrilineal society, whereby the payment or settlement can be made in the form of monies or goods or skill[277] from the groom's family to the bride's family. The purpose of such settlement is to move the association of bride to the groom kinship. Therefore, the attachment of bride from her relatives will be accomplished and the bride will enter the groom's kinship.[278] This kind of marriage can be found in Gayo, Batak, Nias, Lampung, Bali, Timor or Maluku. There are some variants of *Perkawinan Jujur*, among others *mengabdi* marriage*, levirate* marriage*,* and *sonorat* marriage.[279]

3.2.2.2 Semenda Marriage

In a matrilineal system, a marriage will be conducted according to *perkawinan semenda*; whereby a husband and wife stay in the association of their own kinship. Sometimes, a husband will live in the house of the wife's family. In this kind of marriage, children will enter into their mother kinship and clan instead of their father. This kind of system occurs in Minangkabau (West Sumatera). This marriage includes among others *semenda raja-raja, semenda lepas, semenda nunggu, semenda anak gadang, semenda ngangkit, semenda bertandang, semenda menetap*, and *semenda bebas.*

3.2.2.3 Mentas Marriage

According to the parental system, the form of marriage in this system is called as the "*mentas/bebas/mandiri*" marriage. After a marriage, a husband and wife will be independent. They are no longer under the authority of their parents and their parent's kinship and they are about to build their own family. This system can be found in Java, Aceh, Kalimantan and Sulawesi.

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jujur dengan perkawinan ambil anak), (c) *Jujur* marriage by subserve (*perkawinan jujur dengan perkawinan mengabdi*), (d) amount of *Jujur* payment (*Jumlah jujur yang dibayar*), (e) Subserve marriage (*kawin mengabdi* or *suitor service*), (f) Exchange marriage (*Kawin bertukar*), (g) marriage to continue (*kawin meneruskan* or *sororat*), (h) marriage to replace (*kawin mengganti* or *levirat*), (i) matrilineal marriage, (j) adoptive marriage (*kawin ambil anak*).

[277] Wirjono Prodjodikoro, *Op.Cit*, p. 18.

[278] *Ibid.*, p. 17. See also Hilman Hadikusuma, p. 9.

[279] See Sulastriyono, *Hukum Keluarga dan Harta Perkawinan Adat* dalam *Hukum tentang Orang, Hukum Keluarga dan Hukum Waris di Belanda dan Indonesia (Family Law and Adat Matrimonial Asset in Law of Person, Family Law and Inheritance Law in the Netherlands and Indonesia)*, (Bali: Pustaka Larasan, 2012), p. 170.

In addition to those mentioned above, an *Adat* marriage recognizes exogamy and endogamy.[280] Exogamy is a marriage which requires a couple to be from differing clan, and in consequence, marrying a person from the same clan is forbidden. In the endogamy system, a couple from the same clan is allowed. This system is rare in Indonesia; only one territory recognizes and uses this system, namely Toraja. This system is used for practical reasons. However, as time goes by, softening or moderating process over these obligations and prohibitions has occurred in such a way since better inter-regional or inter-territory communication occurs nowadays. Therefore, endogamy is valid and effective only for a very narrow scope of kinship or family.[281]

3.2.2.4 Divorce and Matrimonial Assets

The *Adat* Marriage Law also covers several aspects of marriage, among others, divorce and matrimonial assets. Since this writing focuses on marriage, divorce and matrimonial assets will be elaborated at glance.

The *Adat* law considers divorce as an ultimate exception. Basically, each *Adat* law considers divorce as an action which must be avoided. Kin, family and the community always desire that a marriage lasts for a lifetime. Therefore, if the *Adat* law allows divorce, it must be for the interest of the couple and also the family.[282] Divorce stipulation in the *Adat* Law is influenced by Islam and Christianity. Both religions strongly advice that a marriage should last for a lifetime, therefore divorce as much as possible must be avoided. The background of divorce must be based on the interest of the husband and wife only, not for any reason of the extended family or kinship. The background of divorce in the *Adat* Law accepted by Islam and Christianity are adultery, severe mistreatment, leaving the house with immoral motivation, or infertility (either wife or husband).[283]

Assets of husband and wife according to the *Adat* law are divided into four types. The first type is assets given by the family, for instance inheritance or grant. The second type

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[280] Soerjono Soekanto, *Intisari Hukum Keluarga (translation: Digest of the Family Law)*, (Bandung: Citra Aditya Bakti, 1992), pp. 131-132.

[281] This system can be found in Gayo, Alas, Tapanuli, Minangkabau, South Sumatera, Buru and Seram.

[282] *Ibid.,* p. 144. In Gayo and Batak, divorce can only be settled before a committee, the so-called "*dalihan natolu*". It consists of the family of brother's side of husband, the family of sister's side ("*boru*"), and the family of wife ("*hula-hula*"). Without any assistance from such committee, no divorce can be settled, and basically the committee believes that only death can separate a couple. Based on the *Adat* law, a divorce can happen because of several reasons, among others, if a wife is involved in adultery, infertility, impotency of husband, long separation since a husband leaves the house, wife acting impolitely toward her husband. In other places, divorce can occur if one of the parties, either husband or wife, ignores the *Adat* law.

[283] *Ibid*, p. 147.

is assets acquired by a husband for himself or wife for herself before and during a marriage. The third type is assets acquired by a husband and wife during their marriage as matrimonial assets. The last type is assets as present given to a husband and wife as matrimonial assets on the day of marriage.[284]

Assets acquired from inheritance or grant will remain to be the assets of the receiver, either a husband or wife. They will not become matrimonial assets. Therefore, if they divorce, such assets will remain as the property of the receiver, either a husband or wife, as they are at the first place.[285]

If a husband acquires assets before his marriage, he becomes the owner of such assets. His wife will not be a co-owner, but she is entitled to have the benefit or enjoy such assets. Vice versa, a wife is entitled to become the owner of her belongings at her own efforts. Her husband will not be a co-owner, however he can take benefit from them.[286]

Assets acquired, either by a husband or wife, during a marriage will become matrimonial assets. Each husband or wife has authority over these assets, either for occupation or management. If one of them takes a legal action or makes a transaction upon the assets, such action will be deemed to have been approved by their partner. Any objection to such transaction, either from a husband or wife, must be stated directly.[287] This principle is confirmed in the decision of Supreme Court, that all assets acquired during a marriage is included in matrimonial assets, referred to as "*gono gini*", even though they are acquired by the husband only.[288]

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[284] *Ibid,* pp. 150-151.

[285] *Ibid.* These assets, inheritance or grant assets, may be further inherited to children as legal heirs. However, if he or she passes away without any children, inheritance assets will be re-assigned to the family of the husband or wife who is still alive. Therefore, such assets will stay with the family where it previously belongs, because heirlooms (*barang pusaka*) must stay in the family. It The case will be slightly different for grant. Grant assets may stay with a husband or wife. These assets are referred to as "*Pimbit*" (Ngaju Dayak), "*Sisila*" (Makasar), "*Babaktan*" (Bali), "*asal*" or "*aseli*", "*pusaka*" (Java, Jambi, Riau), "*gono*" or "*gawan*" (Java), "*Barang Sasaka*", "*Barang Banda*", "*Barang Bawa*" (West Java).

[286] *Ibid.*, p. 155. Exception to this general principal is found in several places. In Aceh, income or assets acquired by a husband will still belong to him, if his wife does not give any substantial grant as her participation, for instance a plot of land, house, or fund to the husband on his journey. In West Java, if a wife is wealthy and a husband is poor, revenues acquired by a husband during a marriage become the assets of his wife (*perkawinan nyalindung kagelung*). In the event that the condition is vice versa, the provision remains valid, and such kind of marriage is referred to as *perkawinan manggih kaya*. In Kudus Kulon (Central Java), for traders, assets acquired before or during a marriage will still belong to each husband or wife. There is no matrimonial asset between them.

[287] *Ibid.,* p. 157.

[288] *Ibid.,* p. 159. In the event that divorce occurs, matrimonial assets must be divided equally for both parties. Matrimonial assets are used to divided two-thirds for a husband and one-third for a wife. With the

Assets given as a present for a marriage intended for the couple will belong to the husband and wife. However, jewelries given to a bride will belong to the wife only. In Tapanuli, if a husband takes such jewelries for himself or his own purposes, such action may be a ground for divorce. A plot of land given to a bride before her marriage, belongs to her and will not become matrimonial assets. Utensils or household equipment, even if given to a wife, will belong to a husband and is considered as the payment or repayment or dowries paid by a husband to the father in-law.[289]

3.3 Possibility of the *Adat* Law in the Marriage Law

Art. 1 and Art. 2 of MA 1974 state that a marriage should be concluded pursuant to the respective couple's religion. These articles give no confirmation to the position of the *Adat* Law in legalization or verification of marriage validity. However, in terms of one of the legal resources, MA 1974 gives possibility for the *Adat* Law to become a complementary or secondary source.[290]

The provisions of MA 1974 specify the public or administrative aspects or matters limited to the authority of state officials and authorized courts or forums for a marriage. In other words, MA 1974 stipulates (only) some aspects of a marriage with clear limitations.[291] With those boundaries, possibility for the *Adat* Law to prevail effectively beyond such issues exists. Provisions of *Adat* Law related to the substances, internal matters and belief, which lives in the Indonesian society are possible to apply based on

awareness of equality between a husband and wife, such principle is changed into equally divided between a husband and wife. This principle is confirmed and stated in several decisions of the Supreme Court. See Decision of the Supreme Court dated September 25, 1959 Reg. No. 387K/Sip./1958 whereby the *Adat* Law in Central Java stipulates that a widow shall be entitled to half of marital assets, Decision of the Supreme Court dated April 9, 1960 Reg. No. 120 K/Sip./1960 stipulates that assets acquired during a marriage must be equally divided between a husband and wife. Decision of the Supreme Court dated July 8, 1959 Reg. No. 189 K/Sip./1959, stipulates that as long as a widow does not re-marry, marital assets under her occupation shall not be divided in order to ensure her life. Decision of the Supreme Court dated August 8, 1959 Reg No. 258 K/Sip./1959, division of marital assets cannot be claimed by any other party, except by sons or daughters of the late husband or wife.

[289] *Ibid.,* p. 160.

[290] M. Yahya Harahap, *Kedudukan Janda, Duda dan Anak Angkat dalam Hukum Adat* (translation: Position of Widow, Widower and Adopted Child in the *Adat* Law), (Bandung: Citra Aditya Bakti, 1993, p. 18), also Hazairin, *Tinjauan Mengenai UU Perkawinan Nomor 1 tahun 1974* (translation: Review of Law No. 1 of 1974 regarding Marriage), (Jakarta: Tintamas: 1975), p. 5. Both of them, Yahya Harahap and Hazairin further state that the *Adat* Law does not influence the validity of marriage, divorce or any other marriage matters or issues any longer.

[291] *Ibid.* See Djuhaeri and Hasan as quoted by Otje Salman Sumadiningrat.

the transitional provisions of MA 1974.[292] Although there are some scholars who are in the opinion that the *Adat* Law will no longer prevail. [293]

The *Adat* law is still valid at least in three fields, namely management of matrimonial assets, status of children and transitional provisions.[294] First, the *Adat* Law has an opportunity to be applied in the separation of matrimonial asset in the event of divorce. Art. 37 of MA 1974 specifies that in the event of any divorce and marriage termination, matrimonial assets will be stipulated according to the laws applicable to each husband and wife.[295] The official elucidation of such article states that applicable laws can be the religion's law, *Adat* law or any other prevailing laws. This provision on applicable law is concluded as the acknowledgment and recognition of the *Adat* Law to enforce and control common assets in this particular event. [296]

Secondly, Art. 42 of MA 1972 specifies that a legitimate child is a child who is born in or as a consequence of a legal marriage.[297] Based on the words "in" or "as a consequence", it can be concluded that a child is legitimate if he/she is born in a valid marriage or because of a legal marriage. Therefore, in the event that a child is born

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[292] Otje Salman Sumadiningrat, *Rekonseptualisasi Hukum Adat Kontemporer* (translation: Reconceptualization of Contemporary *Adat* Law)*, Op.Cit.,* pp. 173-174.

Art. 66 of MA 1974 *"Untuk perkawinan dan segala sesuatu yang berhubungan dengan perkawinan berdasarkan atas Undang-undang ini, maka dengan berlakunya Undang-undang ini ketentuan-ketentuan yang diatur dalam Kitab Undang-undang Hukum Perdata (Burgerlijk Wetboek), Ordonansi Perkawinan Indonesia Kristen (Huwelijks Ordonnantie Christen Indonesiers S.1933 No. 74), Peraturan Perkawinan Campuran (Regeling op de Gemengde Huwelijken S.1898 No. 158), dan peraturan-peraturan lain yang mengatur tentang perkawinan sejauh telah diatur dalam Undang-undang ini, dinyatakan tidak berlaku."* Translation: "For a marriage and all matters related to a marriage based on this Law, by the coming into effect of this Law, provisions regulated in the Civil Code (*Burgerlijk Wetboek*), Ordonantie of Indonesian Christian Marriage (Huwelijks Ordonnantie Christen Indonesiers S.1933 No. 74), Regulation of Mixed Marriage (Regeling op de Gemengde Huwelijken S.1898 No. 158), and other regulations which regulate a marriage insofar as it has been regulated in this Law, shall be declared null and void."

[293] The opposite of this opinion can be found from Hazairin. He states that the *Adat* Law is no longer valid after the promulgation of MA 1974. See Hazairin, *Tinjauan Mengenai UU Perkawinan Nomor 1 tahun 1974* (translation: Review of Law No. 1 of 1974 regarding Marriage)*,* p. 5.

[294] R. Otje Salman Sumadiningrat, *Op.Cit.*, pp. 201-203. Otje Salman mentions four possibilities, however, the author believes that now, there are only three possibilities since the validity of marriage is already stipulated in MA 1974, namely according to the religion of the respective couple.

[295] Art. 37 of MA 1974: *"Bila perkawinan putus karena perceraian, harta bersama diatur menurut hukumnya masing-masing."* Translation: "In the event that a marriage is dissolved due to divorce, matrimonial assets shall be provided for according to the respective laws."

[296] R. Otje Salman Sumadiningrat, *Op.Cit.*, pp. 178-179.

[297] Art. 42 of MA 1974. *"Anak yang sah adalah anak yang dilahirkan dalam atau sebagai akibat perkawinan yang sah."* Translation: "A legitimate child shall be a child born out of or as a result of a legal marriage."

before a legal marriage of his/her parent, he/she can become a legitimate child if the parents conclude a valid marriage afterwards.

The status of this child can also be obtained if his/her mother validly marries a man, even though he is not the biological father, which usually happens for emergency reasons. This kind of marriage causes legal consequences between the child and the parents only, therefore no legal relationship will arise between the child and the biological father. In the *Adat* law, this marriage is called as *nikah tambelan* or *laphuwelijk*.[298]

Art. 43 (1) of MA 1974 specifies that an illegitimate child only has a legal relationship with his/her mother and her family.[299] This provision is the same as the concept in the *Adat* Law stating that a child has a relationship with his/her mother and the mother's family. Exception is made only if the biological father gives recognition upon the respective child as his child.

Thirdly, Art. 66 of MA 1974 specifies that the previous marriage laws and regulations are revoked; they continue and will only continue to apply in the event that MA 1974 is silent to the same subject. As a consequence of such provision, certain parts of the previous marriage law and regulations, including the *Adat* Law, will remain applicable. For instance, provisions related to engagement and dowry delivery still depend on the local *Adat* Law.

Based on the possibility above, the author supports the *Adat* Law to become one of the primary sources of the marriage law in Indonesia. In addition, the *Adat* Law is the original law in the Indonesian society and it already lives within the society. Elaboration on marriage stipulation of the marriage law is important and constitutes valuable input for the development of Indonesian marriage law.

4 Notes and Conclusions

Bearing in mind all of the elaborations and discussions above, conclusions and or summaries of the Indonesian marriage law are as follows:

1. MA 1974 is the prevailing marriage law in Indonesia at the national level, replacing the former marriage laws applied in the society at that time.

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[298] Otje Salman, *Ibid.* p. 180.

[299] Art. 43 (1) of MA 1974. *"(1) Anak yang dilahirkan di luar perkawinan hanya mempunyai hubungan perdata dengan ibunya dan keluarga ibunya."* Translation: "(1) A child born out of wedlock shall only have a civil relationship with his/her mother and the mother's family."

2. MA 1974 contains the essential and basic issues, which become its principal characters. First, a marriage must be based on mutual consent of the couple to avoid a forced or arranged marriage (*kawin paksa*). Second, MA 1974 adopts a limited monogamous system by giving a chance for a man to practice polygamy with strict requirements, so that a woman will not easily become a co-wife. MA 1974 has a minimum age requirement for a marriage due to the reason of maturity of the couple. This is to prevent a child marriage and any occurrence of divorce as well as to control the population. A husband and wife have an equal position; therefore, each of them has equal rights and obligations as well as capability to take any legal actions. The last character is that a marriage must be registered with a Registry Office to have legal evidence of the marriage.

3. MA 1974 stipulates that a marriage is a physical and spiritual relationship between a man and a woman as a husband and wife in order to create an eternal happy family based on the Almighty God. This first phrase shows that a marriage in MA 1974 is more than a civil relationship; it also contains religious or sacred values. The definition limits marriage in Indonesia between a heterosexual couple more than merely living together in a partnership relation. This phrase is believed as the limitation of marriage in Indonesian thus it is only for a heterosexual couple; therefore, same sex marriage or gay marriage is forbidden.

4. The definition also reflects the monogamy principle due to the limitation of relationship between a man and woman at a same time. It shows that a man must marry a woman, not some women at the same time and it is applied vice versa. Polygamy and or polyandry are, therefore, forbidden in Indonesia. However, polygamy is not absolutely forbidden, due to the limitation in several articles in MA 1974 which allow a man to have more than one wife for particular reasons. The monogamy principle in MA 1974 should be mentioned as a limited or open monogamy, instead of absolute monogamy.

5. A marriage has an objective namely to create an eternal happy family based on the Almighty God or on religious ground. The last phrase makes a marriage in Indonesia is always related to a spiritual or religion aspect. The spiritual aspect is reflected in the requirements to validate a marriage whereby a couple must obey the provisions and requirements of their religion.

6. Religious or sacred values are reflected in the validation of marriage. MA 1974 states that a marriage is considered to be valid if it is held according to the religion's law of the couple. A marriages must be held according to the religion's law and therefore, no marriage is validly held if it is not in line with the religion's law of the respective couple.

7. After a religious ceremony is held, a couple must register their marriage with a local Registration Office, Vital Records Office (*Kantor Catatan Sipil*) for a non-Moslem couple and Religious Affairs Office (*Kantor Urusan Agama*) for a Moslem couple. Marriage registration constitutes the evidence of marriage. Marriage registration is mandatory pursuant to the Civil Administration Law as a marriage is considered as an important legal event in the life of a legal subject. Registration constitutes valid evidence of the existence of marriage with all legal consequences, not only for the husband and wife but also for any third parties.

8. MA 1974 specifies that a marriage can only be held based on mutual consent of the couple. Parties in a marriage must be free from any pressure or coercion from any parties, their guardian or even their own parents. This provision is made to prevent any forced marriage or arranged marriage which used to occur in the Indonesian society, for basic human rights as well as the objective of marriage itself. A marriage between a husband and wife is about to establish an everlasting marriage and happy family. It will be difficult without the willingness from the respective parties.

9. The requirement of minimum age for a marriage is nineteen years old for a groom and sixteen years old for a bride. Any exception to this provision can only be made upon approval of the local district court or any other authorized officer appointed by the parents, either of the groom or bride. The reasons for limiting the minimum age for a marriage are health of the couple themselves as well as their descendants. From the perspective of demographic administration, it is to suppress population growth or control the population. Lower minimum age for a marriage for women will cause higher population growth. It is composed also for the sake of marriage objective itself. This limitation is made to attain a happy marriage and to avoid any divorce. Therefore, they must be mature enough before entering into a marriage.

10. Parents' approval of a marriage is mandatory if the couple are below the age of 21 years old. If one of the parents has passed away, the permission may come from the existing parent. If both parents have passed away, the permission is given by the guardian, or in the event of absence of parents or guardians, the permission can be replaced by a decision of the local district court. For a Moslem couple, parents' permission is required and it is independent from the minimum age requirement. Therefore, for a Moslem marriage, such permission is required although the respective couple is above the age of 21 years old.

11. Other requirements are the limitation of relation between a couple. Close relatives, for instance, brother and sister or stepbrother and stepsister, family-in-law, is prohibited from marrying. MA 1974 also includes prohibitions of the couple's religion. For instance, prohibition from marrying a family member up to a certain

level, in case that a husband re-marries, the second wife may not be a sister or aunt of the first wife.

12. A couple must follow certain formality requirements in order to have a valid marriage. A formality of marriage starts from notification of the couple to a Civil Registration Office of their marriage at the latest 10 days before the date of marriage. An officer will examine the notification and the fulfilment of marriage conditions to confirm whether the couple can marry or not. If the couple meets all requirements, an announcement at the designated place will be made. If there is no objection from any third parties, the marriage will only be held after the tenth day of such notification. A marriage will be held according to the couple's religion before two witnesses.

13. After a marriage according to their religion, a couple have to sign a Marriage Certificate, which will also be co-signed by witnesses and a Registry Office officer. If they are married according to the Moslem Law, it will also be signed by their parents or guardians. Signing of a Marriage Certificate concludes that a marriage is validly established and registered.

14. MA 1974 adopts limited monogamy principle, while polygamy in MA 1974 is allowed under particular circumstances. In the event that a husband has an intention to have more than one wife, he has to submit his request to the local district court where he lives. Upon such request, the relevant district court can give permission, or to the contrary, refuse his request. The court can give permission for polygamy only for certain reasons as mentioned in MA 1974, namely if a wife cannot perform her obligations as a wife, or a wife suffers physical disability or has an incurable sickness, or a wife cannot give any birth. Before giving the permission, the relevant court is obligated to ask whether or not his existing wife (or wives) agree(s) to be a co-wife. In addition, a husband must provide a guarantee that he is able to afford the necessity of his existing wife (wives) and all children, and a commitment that he will treat his wife (wives) and all children fairly and justly.

15. A marriage has three consequences, namely rights and obligations between a husband and wife, which are equal between them. Second, rights and obligations between parents and children. The lastly consequence is marital assets, which can be excluded by a marital agreement before, on the date of or during a marriage.

16. The *Adat* Law is mentioned in regulations as an un-statutory law and is interpreted as a genuine law of the Indonesian community, as it roots from traditional customs and radiance of Indonesian basic cultures. It binds and defines the thoughts and convictions of Indonesian people.

17. The provisions of MA 1974 specify the public or administrative aspects or matters limited to the authority of state officials and authorized courts or forums for a marriage. In other words, MA 1974 stipulates (only) some aspects of marriage with clear limitations. With those boundaries, the possibility for the *Adat* Law to prevail effectively beyond such issues exists. Provisions of the *Adat* Law related to the substances, internal matters and belief which lives in the Indonesian society are possible to be applied, based on transitional provisions of MA 1974.

18. The *Adat* law is still valid at least in three fields, management of matrimonial assets, status of children and transitional provisions. First, the *Adat* Law has an opportunity to be applied in the separation of matrimonial asset in the event of divorce. Art. 37 of MA 1974 specifies that in the event of divorce and marriage termination, matrimonial assets will be stipulated according to the law applicable to each husband and wife. Official elucidation of such article states that applicable laws can be the religion's law, *Adat* law or any other prevailing laws. This provision on applicable law is concluded as the acknowledgment and recognition of the *Adat* Law to enforce and control common assets in this particular event. Second, the *Adat* Law has the opportunity to regulate relationship between children who are born out of wedlock of the mother. An illegitimate child can become a legitimate child through a marriage referred to as *nikah tambelan* or *laphuwelijk* in the *Adat* Law. This marriage usually happens when a mother validly marries a man even though the man is not the biological father, for emergency reasons. This kind of marriage causes a legal consequence between the child and parents only; therefore, no legal relationship will arise between the child and the biological father. Third, for any other matters as long as the transitional provisions of MA 1974 are valid.

Chapter 3
Indonesian Mixed Marriage

1 Introduction

There are various theses and articles of Indonesian scholars regarding mixed marriage, among others, mixed marriage pursuant to GHR in the sphere of the Intergroup Law, or known as *Hukum Antar-Golongan;*[300] interfaith mixed marriage in Indonesia pursuant to MA 1974 and its possible solutions.[301] There are also discussions about legal consequences for children born from an international mixed marriage,[302] and comparison between marriage regulations of particular states or places, for instance, Australia, Singapore or Hong Kong, where a majority of Indonesian couples have their marriage solemnized or others.[303] It shows that a mixed marriage in Indonesia has significant consideration and attention. Although there are several writings, this topic still has interesting legal aspects for discussion.

This chapter would like to elaborate the international mixed marriage pursuant to MA 1974. The international mixed marriage in MA 1974 is a marriage between two persons in Indonesia who are subject to different legal systems, due to different nationalities one of whom has Indonesian Nationality.[304] In relation to the international mixed marriage,

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[300] Sudargo Gautama, *Segi-segi Hukum Peraturan Perkawinan Campuran (Staatblad 1898 No. 158)* (translation from the author: Legal Aspects of Mixed Marriage (State Gazette 1898 No. 158)), 4th Ed., revised edition, (Bandung: Citra Aditya Bakti, 1996), pp. 279-280. This book is based on his dissertation in the Faculty of Law of Universitas Indonesia defended in early 1955.

[301] Ichtijanto, *Perkawinan Campuran dalam Negara Republik Indonesia* (translation: Mixed Marriages in the Republic of Indonesia), Dissertation, (Jakarta: Badan Litbang Agama dan Diklat Keagamaan, Departemen Agama Republik Indonesia, 2003).

[302] Zulfa Djoko Basuki, *Dampak Perkawinan Campuran terhadap Pemeliharaan Anak, Tinjauan dari Segi Hukum Perdata Internasional* (translation: Impacts of a Mixed Marriage on Child Custody, Review from the Perspective of the Private International Law), Dissertation, (Jakarta: Yarsif Watampone, 2005).

[303] Sri Wahjuni, *Perkawinan Warga Negara Indonesia Beda Agama di Luar Negeri* (translation: Overseas Marriages of Indonesian Citizens with Different Religions), Dissertation, (Yogyakarta: Universitas Islam Indonesia, 2014). Tiurma M. P. Allagan, *Are You (Wo)Man Enough to Get Married?* Indonesian Legal Review Vol. 6 No. 3, 2016.

[304] Art. 57 of MA 1974. *"Yang dimaksud dengan perkawinan campuran dalam Undang-undang ini ialah perkawinan antara dua orang yang di Indonesia tunduk pada hukum yang berlainan, karena perbedaan kewarganegaraan dan salah satu pihak berkewarganegaraan Indonesia."* Translation: "A mixed marriage in this Law shall be a marriage between two persons who in Indonesia, are subject to different laws, due to difference in nationality and one of them is an Indonesian citizen."

this chapter will also discuss the Bill of Indonesian PIL issued in 1997 and the Academic Draft issued in 2015.

In addition to the above, this chapter will also discuss the interfaith mixed marriage. This topic is remarkable in Indonesia and until now is still a trending topic. The latest issues of this topic are the registration of interfaith mixed marriage based on the Civil Administration Law and the decision of the Constitutional Supreme Court. This chapter would like to see whether or not the provisions of the Civil Administration Law serve as the answer to the interfaith mixed marriage.

These two mixed marriages, namely the international mixed marriage and the interfaith mixed marriage, are the remaining mixed marriages in Indonesia. The other two mixed marriages, the inter-region mixed marriage and inter-local (*Adat*) mixed marriage, no longer survive in Indonesia. The inter-region mixed marriage has vanished due to the independence of Indonesia, which makes Indonesia no longer a region of the Netherlands. The inter-local (*Adat*) mixed marriage is not available as of the promulgation of MA 1974 at the national level. Every marriage shall subject to MA 1974. The division of mixed marriage above is described in the dissertation of Sudargo Gautama in early 1955 which still serves as the ground for mixed marriage in Indonesia.[305]

2 International Mixed Marriage

2.1 Definition of international mixed marriage

The international mixed marriage is stipulated in Art. 57-62 Part III, Chapter XII of MA 1974. These provisions cover the requirements of a bride and groom, validation of marriage and legal consequences of marriage.

The international mixed marriage in MA 1974 is stated as a marriage between two persons in Indonesia who are subject to different legal systems, due to different nationalities one of whom has Indonesian Nationality.[306] The definition refers to a couple who are subject to different laws. In this case, the difference is caused by the nationality of the couple one of whom, either the groom or bride, is an Indonesian

[305] Sudargo Gautama, *Segi-segi Hukum Peraturan Perkawinan Campuran (Staatblad 1898 No. 158)* (translation: Legal Aspects of Mixed Marriage (State Gazette 1898 No. 158)), *Loc. Cit.*, p. 3.

[306] Art. 57 of MA 1974. *"Yang dimaksud dengan perkawinan campuran dalam Undang-undang ini ialah perkawinan antara dua orang yang di Indonesia tunduk pada hukum yang berlainan, karena perbedaan kewarganegaraan dan salah satu pihak berkewarganegaraan Indonesia."* Translation: "A mixed marriage in this Law shall be a marriage between two persons who in Indonesia, are subject to different laws, due to difference in nationality and one of them is an Indonesian citizen."

citizen.[307] This definition excludes a couple of Indonesian citizen and foreigner or a couple of Indonesian citizens who solemnize their marriage overseas, which will be discussed in Sub-chapter 3.3. This situation is stipulated in a separate section of international mixed marriage, namely Art. 56 Part II, Chapter XII of MA 1974. The definition also excludes a marriage between foreigners who solemnize their marriage in Indonesia, which will be discussed in Sub-chapter 3.4. In this definition, the couple's nationality becomes the connecting factors which cause the contact between the Indonesian legal system and another legal systems.

2.2 Substantive Requirements

Only when all requirements applicable to a bride and groom are met, the international mixed marriage can be solemnized.[308] As mentioned in the previous chapter, the substantive requirements in Indonesia are stipulated in Art. 6 and 7 of MA 1974. It means that an Indonesian bride or groom must also meet such requirements. For instance, a groom must be at least 19 years old while a bride is 16 years old, in addition to a mutual agreement from both of them to enter into a marriage. A bride who has married and legally divorced, must wait until the lapse of the waiting period, and the bride or groom who is under 21 years old must obtain parental consent. If a groom is married and would like to have a polygamous marriage, the requirements as referred to in Art. 4-5 of MA 1974 apply to him. Hence, he must, among others, have a prior district court's decision to marry.[309] In addition, no direct consanguineal relationship between a couple is allowed or a couple must follow the prohibition as referred to in Art. 8 of MA 1974.[310]

MA 1974 does not directly stipulate the law applicable to any foreigner who will conclude his or her international mixed marriage in Indonesia. Therefore, to determine the applicable law, Art. 16 of AB shall apply.[311] This article adopts the application of Principle of Nationality, which makes the national law of a foreign bride or groom apply

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[307] *Ibid.* *"…, karena perbedaan kewarganegaraan dan salah satu pihak berkewarganegaraan Indonesia."* Translation: "… due to difference in citizenship and one of them is an Indonesian citizen."

[308] Art. 60 (1) of MA 1974. "*Perkawinan campuran tidak dapat dilangsungkan sebelum terbukti bahwa syarat-syarat perkawinan yang ditentukan oleh hukum yang berlaku bagi pihak masing-masing telah dipenuhi.*" Translation: "A mixed marriage may not be solemnized before it is proven that marriage requirements determined by the laws applicable to each party have been met."

[309] Please see the previous discussion in Sub-chapter 2.2.5 regarding polygamous marriage.

[310] Please see the previous discussion in Sub-chapter 2.2.3.1.4 regarding prohibitions.

[311] Art. 16 of AB. "*De wettelijke bepalingen betreffende den staat en de bevoegdheid der personen blijven verbindend voor ingezetenen van Nederlandsch-Indië, wanneer zij zich buiten's lands bevinden.*' Translation: The legal provisions on the State and personal authority shall remain binding for residents of the Dutch East Indies whenever they are overseas."

to them. This applicable law determines whether or not a bride or groom is able to marry, provided that the regulations do not contradict MA 1974.

The fulfillment of all requirements, as required in Art. 60 of MA 1974, is proven by a letter issued by the authorized institution of the respective State.[312] The statement called as the "*Certificate of Ability to Marry*", is valid for six months.[313] This statement may be replaced by a district court decision in the event that the relevant authorized institution refuses to issue such statement. A district court in this case is authorized to consider whether or not such institution has a reasonable argument to refuse the request.[314] If the refusal has no reasonable ground, such district court decision may replace such statement letter.[315]

Before marriage registration is made, a couple is obligated to present the certificate of ability to marry or a court decision as its replacement before a local Religious Affairs Office for a Moslem couple or a local Vital Records Office for a non-Moslem couple. Failure to present this certificate or statement shall be subject to imprisonment for no later than one month, while the respective officer shall be subject to imprisonment for no later than three months in addition to official penalty.[316]

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[312] Art. 60 (2) of MA 1974. "*Untuk membuktikan bahwa syarat-syarat tersebut dalam ayat (1) telah dipenuhi dan karena itu tidak ada rintangan untuk melangsungkan perkawinan campuran, maka oleh mereka yang menurut hukum yang berlaku bagi pihak masing-masing berwenang mencatat perkawinan, diberikan surat keterangan bahwa syarat-syarat telah dipenuhi.*" Translation: "To prove that the requirements referred to in paragraph (1) have been met and therefore, there is no objection to solemnize a mixed marriage, those who according to the law applicable to each party are authorized to register a marriage a statement letter shall give a statement that the requirements have been met."

[313] Art. 60 (5) of MA 1974. "(5) *Surat keterangan atau keputusan pengganti keterangan tidak mempunyai kekuatan lagi jika perkawinan itu tidak dilangsungkan dalam masa enam bulan sesudah keterangan itu diberikan.*" Translation: "(5) A statement letter or decision in lieu of statement shall not have any power if a marriage is held within six months following the provision of such statement."

[314] Art. 60 (3) of MA 1974. "(3) *Jika pejabat yang bersangkutan menolak untuk memberikan surat keterangan itu, maka atas permintaan yang berkepentingan, Pengadilan memberikan keputusan dengan tidak beracara serta tidak boleh dimintakan banding lagi tentang soal apakah penolakan pemberian surat keterangan itu beralasan atau tidak.*" Translation: "(3) In the event that the officer concerned refuses to issue the statement letter, upon request of the interested party, a Court shall give a decision without any procedure and un-appealable in respect of the question whether or not the refusal of provision of the statement letter is reasonable."

[315] Art. 60 (4) of MA 1974. "(4) *Jika Pengadilan memutuskan bahwa penolakan tidak beralasan keputusan itu menjadi surat pengganti keterangan yang tersebut ayat 3.*" Translation: "If a Court decides that the refusal is unreasonable, such decision shall be a letter in lieu of the statement referred to in paragraph 3."

[316] Art. 61 (2) and (3) of MA 1974. *"(2) Barang siapa melangsungkan perkawinan campuran tanpa memperlihatkan lebih dahulu kepada pegawai pencatat yang berwenang surat keterangan atau keputusan pengganti keterangan yang disebutkan dalam Pasal 60 ayat (4) Undang-undang ini dihukum dengan hukuman kurungan selama-lamanya 1 (satu) bulan. (3) Pegawai pencatat perkawinan yang mencatat perkawinan sedangkan ia mengetahui bahwa keterangan atau keputusan pengganti keterangan tidak ada, dihukum dengan*

2.3 Solemnization of International Mixed Marriage

Solemnization of international mixed marriage in Indonesia must comply with the provision on marriage solemnization provided in MA 1974.[317] This provision refers to Art. 2 of MA 1974 which states that a marriage shall be valid if solemnized according to the couple's religion. Therefore, an international mixed marriage must be solemnized according to the religion's law of the couple, and subsequently be registered with the civil registration office as marriage registration pursuant to Art. 61 (2) of MA 1974.[318] A Moslem couple shall make their marriage registration with a local Religious Affairs Office (*Kantor Urusan Agama*) and a non-Moslem couple with a local Vital Records Office.

In relation to marriage solemnization, the process above is in accordance with the principle of *lex loci celebrationis* as referred to in Art. 18 of AB.[319] This article, as the general principle of Indonesian PIL, mentions that the law applicable to a legal action shall be in accordance with the local law of place where such legal action takes place.

2.4 Legal Consequences of International Mixed Marriage

Although it is not primarily within the scope of research, the author would like to provide a brief description of the legal consequences of international mixed marriage in Indonesia. Similar to a domestic marriage, an international mixed marriage also has

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hukuman kurungan selama-lamanya 3 (tiga) bulan dan dihukum jabatan." Translation: "(2) Any person enters into a marriage without first presenting to the authorized registration officer a statement letter or decision in lieu of statement referred to in Article 60 paragraph (4) of this Law shall be subject to imprisonment for no later than 1 (one) month. (3) A marriage registration officer who register a marriage while he/she is aware of the absence of statement or decision in lieu of statement, shall be subject to imprisonment for no later than 3 (three) months and be punished officially."

[317] Art. 59 (2) of MA 1974. *"Perkawinan campuran yang dilangsungkan di Indonesia dilakukan menurut Undang-undang Perkawinan ini."* Translation: "A mixed marriage solemnized in Indonesia shall be held according to this Marriage Act."

[318] Art. 61 (2) MA 1974. *"Perkawinan campuran dicatat oleh pegawai pencatat yang berwenang."* Translation: "A mixed marriage shall be registered by the authorized registration officer."

[319] *Locus regit actum* or *lex loci celebrationis* means that the applicable law is the law of the place where the facts occur. For instance, a marriage is validly concluded if it is held according to the law of country where the marriage is celebrated. A will or testament is valid if it is concluded according to the law of country where the will or testament is concluded or completed. This principle is reflected in Art. 18 of AB. "*1. De vorm van elke handeling wordt beoordeeld naar de wetten van het land of de plaats, alwaar die handeling is verricht. 2. Bij de toepassing van dit en van het voorgaande artikel moet steeds worden acht gegeven op het verschil, hetwelk de wetgeving daarstelt tussen Europeanen en Inlanders.*" Translation: "1. The form of every transaction shall be determined by the laws of the country or place where the transaction takes place. 2. With the application of the current as well as the previous article, consideration shall be given to the differences between Europeans and natives as provided in the legislation."

legal consequences. It covers the relationship between a husband and wife, relationship between parents and children, as well as assets subject to certain principles of PIL rules.

MA 1974 provides the provision on legal consequences of international mixed marriage. It covers the spouse's nationality as well as the applicable law (Art. 58, Art. 59 (1) of MA 1974), position of children born from a valid marriage (Art. 62 of MA 1974) and marital assets.

2.4.1 Nationality of Spouse

An Indonesian citizen who marries a foreigner can obtain the nationality of his/her spouse or he/she may also forfeit his/her nationality according to the prevailing Indonesian rules.[320] The nationality obtained from an international mixed marriage or the termination of marriage shall prevail, in the public and civil area.[321]

Indonesian nationality is regulated in Law No. 62 of 1958 regarding Nationality of the Republic of Indonesia,[322] which is then replaced by Law No. 12 of 2006 regarding the same matter, hereinafter referred to as "**Law No. 12 of 2006**".[323] This amendment was made due to the encouragement to protect women and children of international mixed marriage and adjustment to the ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) by Indonesia.[324]

Law No. 12 of 2006 stipulates that a foreigner who legally marries an Indonesian citizen may acquire Indonesian nationality by submitting a request to the authorized officer.

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[320] Art. 58 of MA 1974. *"Bagi orang-orang yang berlainan kewarganegaraan yang melakukan perkawinan campuran, dapat memperoleh kewarganegaraan dari suami/istrinya dan dapat pula kehilangan kewarganegaraannya, menurut cara-cara yang ditentukan dalam Undang-undang kewarganegaraan Republik Indonesia yang berlaku."* Translation: "Persons of different nationality who enter into a mixed marriage may obtain the nationality of his/her husband/wife and may also lose his/her nationality, according to the methods determined in the prevailing nationality Law of the Republic of Indonesia."

[321] Art. 59 (1) of MA 1974. *"(1) Kewarganegaraan yang diperoleh sebagai akibat perkawinan atau putusnya perkawinan menentukan hukum yang berlaku, baik mengenai hukum publik maupun mengenai hukum perdata."* Translation: "(1) Nationality obtained by a person as a consequence of marriage or dissolution of marriage shall determine the applicable law both with respect to public law and civil law"

[322] Law No. 62 of 1958 regarding Nationality of the Republic of Indonesia, State Gazette No. 113 of 1958, as amended by Law No 3 of 1976 regarding the Amendment to Article 18 of Law No. 62 of 1958 regarding Nationality of the Republic of Indonesia, State Gazette No. 20 of 1976.

[323] Law No. 12 of 2006 regarding the Nationality of the Republic of Indonesia, State Gazette No. 63 of 2006.

[324] General Part of the Official Elucidation of Law No. 12 of 2006. CEDAW is the Convention on the Elimination of All Forms of Discrimination against Women, ratified by Indonesia based on Law No. 7 of 1984 regarding the Ratification of the Convention on the Elimination of All Forms of Discrimination against Women, State Gazette No. 84 of 1984.

Such request may be conveyed after the foreigner stays in Indonesia for the minimum of five years consecutively, or for the minimum of ten years not consecutively, provided that this acquisition of nationality will not cause dual nationality for the foreigner.[325] This requirement does not waive other requirements described in the implementing regulation, Government Regulation No. 2 of 2007.[326] In the event that the provision of Indonesian nationality causes dual nationality, the person may only be given a stay permit.[327]

The provision requiring a certain period before acquiring Indonesian nationality is reasonable. It is to avoid foreigners from marrying Indonesian citizens for certain purposes. For instance, to acquire Indonesian nationality in order to own properties or plots of land in Indonesia. This period is aimed at testing and proving that a marriage or relationship between a husband and wife in a marriage is stable. Thus, it reflects the pure purpose of marriage as to whether or not it is according to the purpose stated in MA 1974.

The foreigner's residency raises PIL question: what is the law applicable to him/her? During the residency of a foreigner in Indonesia, the foreigner's national law is still

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[325] Art. 19 (1), (2) of Law No. 12 of 2006. *"(1) Warga negara asing yang kawin secara sah dengan Warga Negara Indonesia dapat memperoleh Kewarganegaraan Republik Indonesia dengan menyampaikan pernyataan menjadi warga negara di hadapan Pejabat. (2) Pernyataan sebagaimana dimaksud pada ayat (1) dilakukan apabila yang bersangkutan sudah bertempat tinggal di wilayah negara Republik Indonesia paling singkat 5 (lima) tahun berturut-turut atau paling singkat 10 (sepuluh) tahun tidak berturut-turut, kecuali dengan perolehan kewarganegaraan tersebut mengakibatkan berkewarganegaraan ganda."* Translation: "*(1) A foreigner who legally marries an Indonesian national may acquire Nationality of the Republic of Indonesia by submitting a statement to become a citizen an Official. (2) The statement as referred to in paragraph (1) shall be made if the person concerned has lived in a territory of the state of the Republic of Indonesia for not less than 5 (five) years consecutively or for not less than 10 (ten) years not consecutively, unless the acquisition of such nationality causes dual nationality.*"

[326] Government Regulation No. 2 of 2007 regarding Procedure for the Acquisition, Loss, Cancellation, and Reacquisition of Nationality of the Republic of Indonesia, State Gazette No. 2 of 2007. See Art. 3-12 of GR No. 2 of 2007 regarding requirements and process for the acquisition of nationality of the Republic of Indonesia. For instance, other requirements that the foreigner recognizes Pancasila and the 1945 Indonesian Constitution as Indonesian ideology, is in a good condition mentally and physically, speaks in Indonesian language, has no criminal record at the police office, etc. If the foreigner meets all requirements and the authorized officer is of the opinion that the foreigner passes the substantive examination, further examination is at the Ministerial level, and subsequently, the President will accept or refuse the request. If the President accepts the request, the foreigner within three months must take an oath or pledge statement of faithfulness to the Republic of Indonesia. Otherwise, the approval shall be considered null and void. If the President refuses the request, the foreigner shall receive written notification from the Minister.

[327] Art. 19 (3) of Law No. 12 of 2006. *"(3) Dalam hal yang bersangkutan tidak memperoleh Kewarganegaraan Republik Indonesia yang diakibatkan oleh kewarganegaraan ganda sebagaimana dimaksud pada ayat (2), yang bersangkutan dapat diberi izin tinggal tetap sesuai dengan peraturan perundang-undangan."* Translation: "(3) In the event that the person concerned cannot acquire the Nationality of the Republic of Indonesia caused by dual nationality as referred to in paragraph (2), the person concerned may be granted a permanent stay permit in accordance with the prevailing laws and regulations."

applied, pursuant to the Principle of Nationality adopted in Indonesia in Art. 16 of AB. After this period of five or ten years, Indonesian scholars suggest the application of Indonesian laws because his/her residency is considered as permanent residency or marital domicile.[328]

An Indonesian wife who is legally married to a foreigner will lose her Indonesian nationality if according to the law of her husband the nationality of a wife must follow the nationality of a husband as (one) of the legal consequences of their marriage. The same situation applies to an Indonesian husband who is legally married to a foreign wife.[329] An exception is allowed if the Indonesian wife or Indonesian husband wishes to keep his or her Indonesian nationality. They can submit a request to the authorized officer or representative of Indonesia having jurisdiction over their residence, provided that such request will not cause any dual nationality. Such request may be submitted after three years as of the date of their marriage.[330]

2.4.2 Nationality of Children

Indonesia through its previous Nationality Law requires that a person (including children) may only have one nationality. Indonesian nationality may only be acquired

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[328] This situation will be further discussed in Sub-chapter 3.6.2.1 regarding Personal Status.

[329] Art. 26 (1), (2) of Law No. 12 of 2006. *"(1) Perempuan Warga Negara Indonesia yang kawin dengan laki-laki warga negara asing kehilangan Kewarganegaraan Republik Indonesia jika menurut hukum negara asal suaminya, kewarganegaraan istri mengikuti kewarganegaraan suami sebagai akibat perkawinan tersebut. (2) Laki-laki Warga Negara Indonesia yang kawin dengan perempuan warga negara asing kehilangan Kewarganegaraan Republik Indonesia jika menurut hukum negara istrinya, kewarganegaraan suami mengikuti kewarganegaraan istri sebagai akibat perkawinan tersebut."* Translation: "(1) An Indonesian woman who is legally married to a foreigner man shall lose her Nationality of the Republic of Indonesia if according to the law of her husband's country of origin, a wife's nationality shall follow the husband's nationality as a legal consequence of the marriage. (2) An Indonesian man who is legally married to a foreigner shall lose his Nationality of the Republic of Indonesia if according to the law of his wife's country, a husband's nationality shall follow the wife's nationality as a legal consequence of the marriage."

[330] Art. 26 (3), (4) of Law No. 12 of 2006. *"(3) Perempuan sebagaimana dimaksud pada ayat (1) atau laki-laki sebagaimana dimaksud pada ayat (2) jika ingin tetap menjadi Warga Negara Indonesia dapat mengajukan surat pernyataan mengenai keinginannya kepada Pejabat atau Perwakilan Republik Indonesia yang wilayahnya meliputi tempat tinggal perempuan atau laki-laki tersebut, kecuali pengajuan tersebut mengakibatkan kewarganegaraan ganda. (4) Surat pernyataan sebagaimana dimaksud pada ayat (3) dapat diajukan oleh perempuan sebagaimana dimaksud pada ayat (1) atau laki-laki sebagaimana dimaksud pada ayat (2) setelah 3 (tiga) tahun sejak tanggal perkawinannya berlangsung."* Translation: "(3) A woman as referred to in paragraph (1) or a man as referred to in paragraph (2) who wishes to remain as an Indonesian Citizen may submit a statement letter on his intention to an Official or Representative of the Republic of Indonesia whose jurisdiction includes the residence of the woman or man, unless such submission causes a dual nationality. (4) The statement letter as referred to in paragraph (3) may be submitted by the woman as referred to in paragraph (1) or man as referred to in paragraph (2) after 3 (three) years as of the date of marriage.

from an Indonesian father due to the application of *ius sanguinis*.[331] An Indonesian mother may give her nationality to her children if the children have a legal relationship only with her, or if the father is stateless or his nationality is unknown. In this situation, if a marriage is dissolved and children who are foreigners may be deported from Indonesia and separated from their beloved mother.[332]

Law No. 12 of 2006 was promulgated in order to overcome the problem above. Indonesia still adopts *ius sanguinis* in determining nationality. However, the line for granting a nationality covers both sides, namely the father and mother.[333] This law still adopts the Principle of Nationality, but instead of implementing the absolute single nationality, Indonesia adopts a limited dual nationality. It means that children born from an international mixed marriage can have a dual nationality. However, this dual nationality cannot last forever, it is limited until the children reach the age of eighteen years old. At this age or if they marry before the age of 18 years old, within three years as of such date, they must choose one of the nationalities.[334]

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[331] See Art. 1 (b) of Law No. 68 of 1958. "*Warga Negara Republik Indonesia adalah: … (b) orang yang pada waktu lahirnya mempunyai hubungan hukum dengan ayahnya, seorang Warga Negara Republik Indonesia, dengan pengertian bahwa Kewarganegaraan Republik Indonesia tersebut dimulai sejak adanya hubungan kekeluargaan termaksud, dan bahwa hubungan hukum kekeluargaan ini diadakan sebelum orang itu berumur 18 tahun atau sebelum ia kawin pada usia di bawah 18 tahun; (3) anak yang lahir dalam waktu 300 hari setelah ayahnya meninggal dunia, apabila ayah itu pada waktu meninggal dunia warga negara Republik Indonesia; …*" Translation: "A Citizen of the Republic of Indonesian shall be: … (b) a person who at the time of his/her birth has a legal relationship with his/her father, a Citizen of the Republic of Indonesia, with an understanding that the Nationality of the Republic of Indonesia shall commence as of the existence of the intended family relationship, and that the family legal relationship occurs before the person reaches the age of 18 years old or before he/she marries at the age of 18 years old; (3) a child who is born within 300 days after his/her father passes away, if the father at the time of demise is a citizen of the Republic of Indonesia; …"

[332] Zulfa Djoko Basuki, *Dampak Perkawinan Campuran terhadap Pemeliharaan Anak (Child Custody)* (translation: Impact of Mixed Marriage on Child Custody), pp. 235-236. See further the background of Law No. 12 of 2006 from the same author, Zulfa Djoko Basuki, *Bunga Rampai Kewarganegaraan, Dalam Persoalan Perkawinan Campuran* (translation: Anthology of Nationality, in the Issue of Mixed Marriage), (Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2007), pp. 1-6, 81-107.

[333] Art. 4 point (c), (d) of Law No. 12 of 2006. *"Warga Negara Indonesia adalah: ... (c) anak yang lahir dari perkawinan yang sah dari seorang ayah Warga Negara Indonesia dan ibu warga negara asing; (d) anak yang lahir dari perkawinan yang sah dari seorang ayah warga negara asing dan ibu Warga Negara Indonesia; …"* Translation: "An Indonesian Citizen shall be: (c) a child born from a legal marriage of an Indonesian father and foreign mother; (d) a child born from a legal marriage of a foreign father and Indonesian mother; …"

[334] Art. 6 of Law No. 12 of 2006. *"(1) Dalam hal status Kewarganegaraan Republik Indonesia terhadap anak sebagaimana dimaksud dalam Pasal 4 huruf c, huruf d, huruf h, huruf l, dan Pasal 5 berakibat anak berkewarganegaraan ganda, setelah berusia 18 (delapan belas) tahun atau sesudah kawin anak tersebut harus menyatakan memilih salah satu kewarganegaraannya. (2) Pernyataan untuk memilih kewarganegaraan sebagaimana dimaksud pada ayat (1) dibuat secara tertulis dan disampaikan kepada Pejabat dengan melampirkan dokumen sebagaimana ditentukan di dalam peraturan perundang-undangan. (3) Pernyataan untuk memilih kewarganegaraan sebagaimana dimaksud pada ayat (2) disampaikan dalam waktu paling lambat 3 (tiga) tahun setelah anak berusia 18 (delapan belas) tahun atau sudah kawin."* Translation: "(1) In the event that

The age limitation is accordance with the maturity age applicable in Indonesia.[335] By this amendment, children from an international mixed marriage will not face a threat of separation from the family by deportation.

A dual nationality in a family of mixed marriage and dual nationality of children from an international mixed marriage raise a PIL problem: what is the law applicable to the family or children: the laws of the husband or wife? Or the law of children cumulatively at the same time?

Indonesian scholars in the field of PIL are of the opinion that the law applicable to the family of children is the national law to which the family or children have the real connection and or of the effective nationality. Real connection and or effective nationality cover the entire daily life or habitual residence of the relevant family and/or children, social facts surrounding them i.e. residence, center of interest, family relationship, participation of social and state life, bound or attached a feeling to a particular country.[336]

The author supports this thought because the applicable law shall be a law which has the closest connection with the respective family. In relation to children, it shall be the children's habitual residence due to their best interest. This is important because in a particular occasion, the children's national law may not be in line with or support their best interest.[337]

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the status of Nationality of the Republic of Indonesia of children as referred to in Article 4 sub-article c, sub-article d, sub-article h, sub-article l, and Article 5 causes a dual nationality, after reaching the age of 18 years old or after a marriage, the children must make a statement to choose one of their nationalities. (2) The statement to choose a nationality as referred to in paragraph (1) shall be made in writing and submitted to the Official by attaching the document as determined in laws and regulations. (3) The statement to choose a nationality as referred to in paragraph (2) shall be submitted by no later than 3 (three) years after they reach the age of 18 (eighteen) years old or are married."

[335] Zulfa Djoko Basuki, *Bunga Rampai Kewarganegaraan, Dalam Persoalan Perkawinan Campuran* (translation: Anthology of Nationality, in the Issue of Mixed Marriage), (Jakarta: Badan Penerbit FHUI, 2007), p. 19. Further see Art. 47 of MA 1974, Art. 1 of Law No. 23 of 2002 regarding Child Protection, Art. 1 of Law No. 3 of 1997 regarding Juvenile Court, Art. 1 of Law No. 39 of 1999 regarding Human Rights.

[336] Sudargo Gautama, *Hukum Perdata Internasional Indonesia, Jilid II Bagian III, buku Ke-empat* (Bandung: Alumni, 1989), p. 274. See also Zulfa Djoko Basuki, *Bunga Rampai Kewarganegaraan, Dalam Persoalan Perkawinan Campuran* (translation: Anthology of Nationality, in the Issue of Mixed Marriage), Loc. Cit., pp. 43-44; Zulfa Djoko Basuki, *Dampak Perkawinan Campuran terhadap Pemeliharaan Anak (Child Custody), Loc. Cit.,* p. 258, yet in later writing she refers to the child's habitual residence. In other writings, she quotes Leenard Pålsson, *Marriage and Divorce in Comparative Conflict of Laws* (Leiden, A.W. Sijthoff, 1974), p. 84-85. Families and/or children must be subject to the law which has the most connection to them. "*... the nationality of the country with which the person in question is most effectively and really linked" or "… the nationality with which, in view of all circumstances the person is most closely connected.*"

[337] Zulfa Djoko Basuki, *Dampak Perkawinan Campuran terhadap Pemeliharaan Anak (Child Custody), Loc. Cit.,* p. 255.

2.4.3 Applicable Law of International Mixed Marriage

The status of children is stipulated according to the national law of an international mixed marriage couple.[338] MA 1974 mentions that the position of children in a mixed marriage shall be determined by the family's nationality. When the family's nationality is Indonesia, Indonesian law shall apply and determine the child's position.

This provision above is sufficient when the respective family only have one nationality. There are some families in which each of the husband and wife preserves their nationality. Therefore, there may be two or more national laws apply to the family. This situation is possible as MA 1974 or any other prevailing regulation does not prohibit a family from having two nationalities.

In this situation, what is the applicable law? The possible applicable laws are the parents' national laws. As far as the author's concern, there is no Indonesian landmark decision on this matter. Indonesian scholars' opinion comes from Sudargo Gautama, stating that the applicable law should be the father's law due to the union of law in the family *(kesatuan hukum dalam keluarga)*. It is acceptable because at that time, the previous Indonesian Nationality Law adopted the concept concerned.[339] However, due to the development of matters on children, it is advisable that Indonesia applies the law of country where the children concerned have their habitual residence, as well as their best interest. This matter will be further discussed in Sub-chapter 3.6.2.4.2.2.

2.4.4 Marital Assets

Marital assets of an international mixed marriage are stipulated according to general marital assets in Art. 35 of MA 1974.[340] Assets which belong to a bride or groom before they get married will remain the property each of the couple. Marital assets which jointly

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[338] Art. 62 of MA 1974. *"Dalam perkawinan campuran kedudukan anak diatur sesuai dengan Pasal 59 ayat (1) Undang-undang ini."* Translation: "In a mixed marriage, a child's position shall be regulated in Article 59 paragraph (1) of this Law."

[339] Sudargo Gautama, *Hukum Perdata Internasional Indonesia Jilid III Bagian I, Buku ke-7* (translation: Indonesian International Private Law, Volume III Part I, the 7th Book), 3rd revised Ed. (Bandung: Penerbit Alumni, 2010), pp. 89-91. In this book, Sudargo Gautama is aware of the development and tendency that the law applicable to children shall also consider the child's welfare or interest. This suggestion is further developed by Zulfa Djoko Basuki in her dissertation. In one of the recommendations, she suggests that the law applicable to children custody is the law of the children's habitual residence. See Djoko Basuki, *Dampak Perkawinan Campuran terhadap Pemeliharaan Anak (Child Custody), Loc. Cit.,* p. 258.

[340] Art. 35 of MA 1974. *"(1) Harta benda yang diperoleh selama perkawinan, menjadi harta bersama. (2) Harta bawaan dari masing-masing suami dan istri dan harta benda yang diperoleh masing-masing sebagai hadiah atau warisan, adalah di bawah penguasaan masing-masing sepanjang para pihak tidak menentukan lain."* Translation: "(1) Assets acquired during a marriage shall become matrimonial assets. (2) Default assets of each of the husband and wife and assets acquired by each of them as a gift or inheritance, shall be under the their respective control, insofar as the parties do not determine otherwise."

belong to a husband and wife are the properties and assets acquired as of the date of their marriage.

Such unification of assets may be avoided through a conclusion of a marital agreement between the couple, as stipulated in Art. 29 of MA 1974.[341] The article stipulates that before or on the date of marriage, a husband and wife may enter into an agreement in writing, legalized by a Vital Records officer. The provisions concluded by the parties in the respective agreement will also apply to any third parties. Such agreement will only be legalized if the provisions thereof do not contradict the prevailing legal rules, religion and good moral (*kesusilaan*), and effective as of the date of marriage. Amendments to a marital agreement are possible based on the consent of husband and wife insofar as such amendments will not prejudice harm any third parties.

In MA 1974, it is stated that a marital agreement must be in line with the prevailing legal rules. It means that this marital agreement may not contradict the prevailing laws and regulations on property in Indonesia. Further, the Indonesian PIL principle as described in Art 17 of AB, stating that the law applicable to the goods is the law of country where the goods are located still applies.

Nowadays, based on decision of the Constitutional Court No. 69/PUU-XIII/2015, a marital agreement can be concluded on the date of or during a marriage. Furthermore, any amendment or revocation is possible based on the consent of husband and wife as long as such amendment and or revocation will not prejudice any third parties.[342]

3 Marriage Solemnized outside the Territory of Indonesia and its Registration

This paragraph will cover marriages solemnized abroad. Based on regulations, such marriages can be divided into two types, (i) marriage solemnized before a local

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[341] Art. 29 of MA 1974. *"(1) Pada waktu atau sebelum perkawinan dilangsungkan, kedua pihak atas persetujuan bersama dapat mengadakan perjanjian tertulis yang disahkan oleh Pegawai pencatat perkawinan, setelah mana isinya berlaku juga terhadap pihak ketiga sepanjang pihak ketiga tersangkut. (2) Perjanjian tersebut tidak dapat disahkan bilamana melanggar batas-batas hukum, agama dan kesusilaan. (3) Perjanjian tersebut mulai berlaku sejak perkawinan dilangsungkan. (4) Selama perkawinan berlangsung perjanjian tersebut tidak dapat diubah, kecuali bila dari kedua belah pihak ada persetujuan untuk mengubah dan perubahan tidak merugikan pihak ketiga."* Translation: "(1) At the time of or prior to a marriage, both parties upon mutual approval may enter into a written agreement legalized by a marriage registration Official, whereupon the content shall also apply to third parties insofar as such third parties are concerned. (2) The agreement may not be legalized if it violates the limits of law, religion and morality. (3) The agreement shall come into effect as of the holding of marriage. (4) During the marriage, the agreement may not be amended, except by mutual agreement of both parties to amend it and such amendment shall not prejudice any third parties."

[342] Please see the explanation in sub-chapter 2.6.3.2 of Chapter 2.

authorized institution and according to the local prevailing laws and regulation, and (ii) marriage solemnized at the Indonesian representative office. They will be followed with a discussion about the obligation to register a marriage with the vital records office after the couple return to Indonesia, particularly whether or not marriage registration is equivalent as marriage recognition by the Indonesian government.

3.1 Marriage Solemnized abroad

An Indonesian citizen who will conclude a marriage abroad, either with another Indonesian citizen or with a foreigner, must comply with the provisions of MA 1974, particularly Art. 56 of MA 1974.[343] It stipulates that a marriage held abroad shall be considered valid if it is held according to the local prevailing laws and regulations where the marriage is solemnized, provided it does not contradict the regulation of MA 19754. A marriage should be registered with the vital records office in the respective state or its equivalent. Furthermore, the relevant couple are obligated to register their marriage certificate with the Registry Office where they have their domicile within a year as of their return to Indonesia.[344] In the event of no marriage registration office in the state where the marriage takes place, marriage registration can be made with an Indonesian representative office. According to this regulation, the registration can be made even though the marriage is solemnized according to the law of a foreign state, at the consular section.[345]

The provisions above are similar to the provisions stated in BW. A marriage held abroad, either between Indonesian citizens or between a foreigner and Indonesian citizen is considered validly concluded if such marriage is held pursuant to the law of country where the marriage takes place. For Indonesian citizens, they have to obey the

[343] Art. 56 (1) of MA 1974 "*Perkawinan yang dilangsungkan di luar Indonesia antara dua orang warga Negara Indonesia atau seorang warga Negara Indonesia dengan warga Negara Asing adalah sah bilamana dilakukan menurut hukum yang berlaku di Negara di mana perkawinan itu dilangsungkan dan bagi warga Negara Indonesia tidak melanggar ketentuan-ketentuan Undang-undang ini.*" Translation: A marriage solemnized outside Indonesia between two Indonesian citizens or one Indonesian citizen and a foreigner shall be valid if it is solemnized according to the law applicable in the Country where the marriage takes place and for Indonesian citizens, it does not violate the provisions of this Law."

[344] Art. 56 (2) of MA 1974 "*(2) Dalam waktu satu tahun setelah suami istri itu kembali di wilayah Indonesia, surat bukti perkawinan mereka harus didaftarkan di Kantor Pencatatan Perkawinan tempat tinggal mereka.*" Translation: "(2) Within one year after a husband and wife return to the territory of Indonesia, their marriage certificate must be registered with a Marriage Registration Office of their residence."

[345] Previously, marriage registration can be made at a local authorized marriage registration office, but now, marriage registration can be conducted by officers at the representative office or embassy, in particular at the consular section.

requirements as referred to in BW.[346] This obligation also includes, for instance, the requirement of monogamy as described in Art. 27 BW.[347] Within a year after they return to Indonesia, they were required to register their marriage with the local vital records office in Indonesia pursuant to Art. 84 BW.[348]

Those provisions are in line with the principle of PIL as described in Art. 16 and Art. 18 of AB. The requirement of capacity of a groom or bride who is an Indonesian citizen remains subject to the Indonesian law although his/her marriage is held abroad, as a consequence of the Principle of Nationality described in Art. 16 of AB. Marriage solemnization must be pursuant to the regulations where it takes place, in line with Art. 18 of AB. It shall be considered valid in Indonesia provided it does not contradict the prevailing marriage regulations in Indonesia and public policy.

3.2 Marriage at an Indonesian Representative Office or Indonesian Embassy

In 1978, there was a case before the North-East District Court of a petition for marriage nullification.[349] The petition was filed not long after the promulgation of MA 1974. The petitioner requested the North-East District Court to nullify a marriage solemnized in

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[346] Art. 83 of BW. "*Perkawinan yang dilangsungkan di luar negeri, baik antara sesama Warga Negara Indonesia, maupun antara Warga Negara Indonesia dengan warga negara lain, adalah sah apabila perkawinan itu dilangsungkan menurut cara yang biasa di Negara tempat berlangsungnya perkawinan itu, dan suami istri yang Warga Negara Indonesia tidak melanggar ketentuan-ketentuan tersebut dalam Bagian 1 Bab ini.* Translation*:* "A marriage held abroad, both between fellow Indonesian Citizens, or between an Indonesian Citizen and a foreigner, shall be valid, if the marriage is held according to the ordinary method in the country where the marriage takes place, and the husband and wife, who are Indonesian Citizens, do not violate the provisions of Section 1 of this Chapter. In Dutch: "*De buiten's lands hetzij tusschen Nederlandsche onderdanen onderling, hetzij tusschen deze en anderen aangegane huwelijken zijn van waarde, indien dezelve voltrokken zijn naar den vorm welke gebruikelijk is in het land, waar de voltrekking heeft plaats gehad, en de echtenootedm die Nederlandsche onderdanen zijn, niet hebben gehandeld tegen de bepalingen in de eerste afdeeling van dezen titel vermeld."*

[347] Art. 27 of BW. "Pada waktu yang sama, seorang lelaki hanya boleh terikat perkawinan dengan satu orang perempuan saja; dan seorang perempuan hanya dengan satu orang lelaki saja." Translation: "*At the same time, a man may only be bound by one woman; and a woman only bound to one man.*" In Dutch: "De man kan tegenlijkertijd slechts met eene vrouw, de vrouw slechts met eenen man door het huwelijk verbonden zijn." See also Zulfa Djoko Basuki, *Hukum Perkawinan di Indonesia* (translation: Marriage Law in Indonesia), (Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2010), p. 8.

[348] Art. 84 of BW: *Dalam waktu satu tahun setelah kembalinya suami istri ke wilayah Indonesia, akta tentang perkawinan mereka di Indonesia harus didaftarkan dalam Daftar Umum perkawinan di tempat tinggal mereka."* Translation: "Within one year after the return of a husband and wife to the territory of Indonesia, the deed of their marriage in Indonesia must be registered with the Public Register of marriage in their residence." In Dutch: *"Binnen het jaar na de terugkomst der echtgenooten op het grondgebeid van Indonesie, zal de acte van huwelijks-voltrekking, buiten's lands aangegaan, in het openbaar huwelijks-register van hunne woonplaats moeten worden overgeschreven."*

[349] At that time the North District Court and East District Court of the Republic of Indonesia were not yet separated. See also Zulfa Djoko Basuki, *Hukum Perkawinan di Indonesia, Op.Cit.,* pp. 107-109.

Hong Kong on April 15, 1969.[350] The judge refused to nullify the marriage and stated that it had no authority to examine the case. In this case, the judge mentioned that the marriage is solemnized according to Moslem marriage, and set aside Hong Kong regulation which should be applied according to Art. 56 of MA 1974.

The case drew the attention of Charles Himawan, an Indonesian PIL scholar. He gave valuable notes about this case. He stated that the judge used the public policy of PIL to set aside Hong Kong regulation as the applicable law. However, he advised that the judge should be careful in using the public policy. The application of public policy should not set aside the applicable law which was determined by the national law (which is considered new at that time). MA 1974 requires a religious solemnization marriage in Hong Kong, which was rare and difficult to find. This could cause a problematic situation for couples in particular states.

The consideration above was responded to twenty years later by the issuance of Joint Regulation of the Minister of Religious Affairs and the Minister of Foreign Affairs of the Republic of Indonesia No. 589 of 1999 and No. 182/OT/X/99/01 of 1999 regarding the Guideline on Marriage Solemnization of Indonesian Citizens abroad dated October 13, 1999.[351]

A marriage in an Indonesian Representative Office or Indonesian Embassy is possible and it may be performed according to Joint Decision of the Minister of Religious Affairs and Minister of Foreign Affairs No. 589 of 1999 and No. 182/OT/X/199/01 of 1999 regarding the Guideline on Marriage Solemnization of Indonesian Citizens Abroad, (hereinafter referred to as "**Joint Decision No. 598**".[352]

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[350] Charles Himawan, *Komentar Keputusan Hakim* in *Jurnal Hukum dan Pembangunan No. 1 of IX, January 1979,* pp. 71-82. The note from Charles Himawan on the North-East Court Decision No. 253/1978.G. The marriage in question was solemnized in 1969 before a priest and at "Moslem Universal Love Society". It appears that the priest had no legal license and the place was not a legal place for marriage solemnization according to Hong Kong regulations. After the couple returned to Indonesia, they did not register their marriage with the Marriage Registration Office as required by the Indonesian regulation. Time goes by and in 1978, the wife requested a nullification of the marriage. The wife argued that the marriage in question was not held according to Hong Kong regulations. This was based on Art. 18 of AB (when the marriage was solemnized), equal to Art. 56 of MA 1974 when the petition was submitted to the district court. Both regulations state that a marriage is valid if it is held according to the local prevailing regulation. The fact that the marriage is solemnized according to the Moslem Law, made the judge stated that he had no authority to examine the petition and appointed that the religious court is the authorized one. In his consideration, the judge mentioned that the marriage was held according to the religion of the majority of Indonesian society, which contains divine values. Therefore, it is not appropriate if the regulation of man nullifies the sacred marriage; in the opinion of the judge.

[351] Zulfa Djoko Basuki, *Hukum Perkawinan di Indonesia*, *Loc. Cit.*, p. 108.

[352] *Keputusan Bersama Menteri Agama RI dan Menteri Luar Negeri RI* (Joint Decision of the Minister of Religious Affairs of RI and Minister of Foreign Affairs of RI) No. 589 of 1999 and No. 182/OT/X/99/01 of 1999 regarding Guideline on Marriage Solemnization of Indonesian Citizens Abroad. This regulation is further

This regulation was issued to facilitate Moslem Indonesian Citizens who are abroad and would like to solemnize their marriage in the respective state. It is to facilitate the couple in case that it is difficult to find a mosque and or *penghulu*. According to Art. 2 of this regulation, the place of marriage must be an Indonesian Embassy or Indonesian Representative Office.[353] In the event that the place of marriage is a vessel, the registration shall be made in the territory where the vessel is docked.[354]

The officer who performs and registers the marriage must have knowledge about Moslem marriage and civil administration. Such officer is appointed by the Minister of Religious Affairs with a recommendation from the Minister of Foreign Affairs.[355] This officer will act as *penghulu* and perform the marriage solemnization.[356] After the marriage is solemnized, marriage registration shall also be made at the same office. This regulation is acceptable because the location of such office is considered as Indonesian territory. Thus, such marriage is considered as solemnized within the Indonesian territory.

In relation to the capacity to marry, this regulation refers to the Indonesian regulations, in particular the requirements for a Moslem bride and or Moslem groom. The officer is obligated to observe whether or not the bride or groom fulfil the requirements according to MA 1975.[357]

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elaborated by Joint Regulation of *Dirjen Bimas Islam dan Urusan Haji* and Protocol and Consular No. 280/07 of 1999, No. D/447 of 1999 regarding Technical Guideline on Marriage Solemnization of Indonesian Citizens Abroad.

[353] Art. 2 of Joint Decision No. 598. "*Tempat Pencatatan Perkawinan Luar Negeri adalah KBRI atau perwakilan Indonesia di Luar Negeri."* Translation: "The Place for Marriage Registration Abroad shall be an Indonesian Embassy or Indonesian representative office Abroad."

[354] Art. 3 of Joint Decision No. 598. *"(1) Apabila terjadi perkawinan di atas Kapal Laut maka pencatatannya di daerah di mana kapal tersebut berlabuh. (2) Dalam hal ini di wilayah itu tidak ada Perwakilan Indonesia maka dicatat pada Perwakilan Indonesia yang mewilayahi daerah tersebut."* Translation: "(1) If marriage solemnization is conducted on a Vessel, marriage registration shall be made in the territory where the Vessel is anchored. (2) In the event that there is no Indonesian representative office, registration shall be made at an Indonesian representative office having jurisdiction over such territory."

[355] Art. 4 of Joint Decision No. 598. *"Pegawai Pencatat Nikah yang dimaksud Pasal 1 di atas adalah Pegawai Negeri yang diangkat dan ditunjuk khusus untuk itu."* Translation: "A Marriage Registration Officer as referred to in Art. 1 shall be a civil servant appointed to perform such task in particular."

[356] Art. 5 of Joint Decision No. 598. *"Dalam hal pengangkatan Pegawai Pencatat Nikah dengan syarat sebagai berikut: (1) Menguasai hukum munakahat dan peraturan perundang-undangan di bidang perkawinan serta administrasi; (2) Diangkat dan diberhentikan oleh Menteri Agama berdasarkan usul Menteri Luar Negeri."* Translation: "A Marriage Registration Officer shall be appointed with the following requirements: (1) Mastering *munakahat* law and laws and regulations in the field of marriage and administration; (2) Appointed and dismissed by the Minister of Religious Affairs based on recommendation of the Minister of Foreign Affairs."

[357] *Joint Decision of the Minister of Religious Affairs of the Republic of Indonesia and the Minister of Foreign Affairs No. 589 and No. 182/DT/X/99/01.* See also Zulfa Djoko Basuki *Hukum Perkawinan di Indonesia,* (Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2010), pp. 110-112.

This facility is known as the "consular marriage" developed in the 19th centuries. This kind of marriage is one of the alternatives for a couple to have their marriage solemnized. This is the service and protection of the government to its citizens who are abroad. This service is provided because a marriage in the correspondent state is considered incompatible with a marriage in the original state.[358] In this case, Indonesia applies or places the first priority on religious marriage while the correspondent state applies the civil marriage.

3.3 Marriage Registration after Returning to Indonesia = Marriage Recognition?

The requirement to register all important events for civil administration is stipulated in the Civil Administration Law.[359] It requires a couple who have their marriage solemnized abroad to register their marriage at the local authorized registration office in the respective state. This registration shall be followed by a report or notification to an Indonesian representative office in the respective state. In the event of no registration marriage office in the respective state, marriage registration must be made with an Indonesian representative office. Upon this registration, the Indonesian representative office will issue a Marriage Certificate. If they return to Indonesia, the couple must report their marriage at the local Registration Office within thirty days as of their arrival in Indonesia.[360] Slightly different from MA 1974 which stipulates that the report to a

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[358] *Ibid.* Zulfa Djoko Basuki quoted Lennart Palsson, *Marriage and Divorce in Comparative Conflict of Laws,* (Leiden L A.W. Sijthoff, 1974), pp. 258.

[359] Art. 3, 4 of the Civil Administration Law. *"(3) Setiap Penduduk wajib melaporkan Peristiwa Kependudukan dan Peristiwa Penting yang dialaminya kepada Instansi Pelaksana dengan memenuhi persyaratan yang diperlukan dalam Pendaftaran Penduduk dan Pencatatan Sipil. (4) Warga Negara Indonesia yang berada di luar wilayah Republik Indonesia wajib melaporkan Peristiwa Kependudukan dan Peristiwa Penting yang dialaminya kepada Instansi Pelaksana Pencatatan Sipil negara setempat dan/atau kepada Perwakilan Republik Indonesia dengan memenuhi persyaratan yang diperlukan dalam Pendaftaran Penduduk dan Pencatatan Sipil."* Translation: "(3) Each Resident shall be obligated to report any Population Event and Important Event experienced by him/her to the Implementing Institution by meeting the requirements required in Population Registration and Vital Records. (4) Indonesian Citizens who are outside the territory of the Republic of Indonesia shall be obligated to report Population Event and Important Event experienced by him/her to the Implementing Agency of Vital Records of the local country and/or to a Representative Office of the Republic of Indonesia by meeting the requirements required in Population Registration and Vital Records."

[360] Art. 37 of the Civil Administration Law. *"(1) Perkawinan Warga Negara Indonesia di luar wilayah Negara Kesatuan Republik Indonesia wajib dicatat pada Instansi yang berwenang di negara setempat dan dilaporkan pada Perwakilan Republik Indonesia. (2) Apabila negara setempat sebagaimana dimaksud pada ayat (1) tidak menyelenggarakan pencatatan perkawinan bagi orang asing, pencatatan dilakukan pada Perwakilan Republik Indonesia setempat. (3) Perwakilan Republik Indonesia sebagaimana dimaksud pada ayat (2) mencatat peristiwa perkawinan dalam Register Akta Perkawinan dan menerbitkan Kutipan Akta Perkawinan. (4) Pencatatan perkawinan sebagaimana dimaksud pada ayat (1) dan ayat (2) dilaporkan oleh yang bersangkutan kepada Instansi Pelaksana di Indonesia di tempat tinggalnya paling lambat 30 hari sejak yang bersangkutan kembali ke Indonesia."* Translation: "(1) A marriage of Indonesian Citizens outside the territory of the Republic of Indonesia must be registered with the authorized Agency in the local country and be reported to the

civil registration must be made within a year. Since the Civil Administration Law is promulgated later than MA 1974, based on the principle *lex posterior derogate legi priori,* the report must be done within thirty days.

Based on the provisions above, a Registration Office in Indonesia shall register the marriage after they have evidence that the marriage is solemnized properly in another state. Such evidence can be issued by a foreign registration office or Indonesian representative office. Based on it, the Marriage Registration Office relies on the fact that the occurrence of marriage event is according to the local law, in line with Art. 56 of MA 1974 and Art. 18 of AB.

The Civil Administration Law also stipulates the consequence of delay in marriage registration. Any delay in the registration above shall not affect the validity of marriage. The delay shall be subject to a fine in the maximum amount of IDR1,000,000.[361]
The Civil Administration Law stipulates above the question whether or not the respective marriage is valid. Therefore, the answer to marriage validity can only be found in Art. 56 (1) of MA 1974. It clearly mentions that a marriage solemnized abroad shall be considered valid if it is solemnized according to the local law and not contradicting MA 1974. If this regulation is read side by side with Art. 2 (2) of MA 1974 stating that (a) all marriage must be registered and (b) Art. 1 point (8) of the Civil Administration Law that the document issued by the Marriage Registration Office is authentic evidence,[362] then it can be concluded that marriage registration with the Marriage Registration Office in Indonesia is considered as the recognition of marriage solemnized abroad. Upon registration, the Marriage Registration Office shall issue an authentic evidence stating that the respective marriage has occurred. It means that

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Representative Office of the Republic of Indonesia. (2) In the event that the local country as referred to in paragraph (1) does not make any marriage registration for foreigners, registration shall be make with the local Representative Office of the Republic of Indonesia. (3) The Representative Office of the Republic of Indonesia as referred to in paragraph (2) shall register the marriage event in the Marriage Deed Register and issue the excerpt from Marriage Deed. (4) The marriage registration as referred to in paragraph (1) and (2) shall be reported by the person concerned to the Implementing Agency in Indonesia in his/her residence by no later than 30 days since the person concerned returns to Indonesia."

[361] Art. 90 (1) and (2) of the Civil Administration Law. *"(1) Setiap penduduk dikenai sanksi administratif berupa denda apabila melampaui batas waktu pelaporan Peristiwa Penting dalam hal: … (b) perkawinan sebagaimana dimaksud dalam Pasal 34 ayat (1) atau Pasal 37 ayat (4): …. (2) Denda administratif sebagaimana dimaksud pada ayat (1) paling banyak Rp.1.000.000,00 (satu juta Rupiah)."* Translation: "(1) Every citizen shall be subject to an administrative sanction in the form of fine if he/she exceeds the deadline for reporting an Important Event in the event of: … (b) marriage as referred to as Article 34 paragraph (1) or Article 37 paragraph (4): …. (2) The administrative fine as referred to in paragraph (1) shall be at the maximum of Rp.1,000,000."

[362] Art. 1 sub-article (8) of the Civil Administration Law. "*(8) Dokumen Kependudukan adalah dokumen resmi yang diterbitkan oleh Instansi Pelaksana yang mempunyai kekuatan hukum sebagai alat bukti autentik yang dihasilkan dari pelayanan Pendaftaran Penduduk dan Pencatatan Sipil.*" Translation: "Population Affairs Document shall be an official document issued by the Implementing Agency which has legal power as authentic evidence resulting from Population Registration and Vital Records service."

Indonesia recognizes the marriage in question. Therefore, the marriage is recognized and acknowledged as valid, as long as no other authentic evidence states otherwise. In relation to a Moslem marriage between Indonesian citizens abroad which have not been registered with a local marriage registration office or Indonesian representative office, the Indonesian religious court provide a solution to their registration. If they return to Indonesia, the couple can re-marry or the couple can request for a decision from the Central Jakarta Religious Court, that their marriage exists (*penetapan itsbat nikah*).[363] Based on this decision, a Religious Affairs Office (*Kantor Urusan Agama*) shall register their marriage and issue a marriage certificate. The decision shall be given with a condition that the respective couple comply with Indonesian laws and regulations; in particular, their marriage must be according to the Moslem Law. In short, their marriage has no fraudulent or evasion of laws or is not a polygamous marriage without any legal procedure (approval from a district court and approval from the existing wife or wives).[364]

In the event that a Moslem marriage between Indonesian citizens is held abroad and their marriage is, unfortunately, not registered with a local marriage registration office, PIL regulation shall play a role. If a foreign state requires marriage registration, while the marriage is not registered, it means that such marriage contradicts the local prevailing regulation. However, the Central Jakarta Religious Court sets aside the local prevailing laws and regulations according to the principle of *lex loci celebrationis* described in Art. 56 of MA 1974. Further, the judge will apply the Indonesian laws in examining as to whether or not the marriage is properly solemnized according to the Indonesian law (the Compilation of Moslem Laws). In this regard, the Indonesian regulations override the foreign law to determine the existence of marriage.

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[363] Art. 66 (4) of Law No. 7 of 1989 regarding Religious Court System. "*Dalam hal Pemohon dan Termohon bertempat kediaman di luar negeri, maka permohonan diajukan di pengadilan yang daerah hukumnya meliputi tempat perkawinan mereka dilangsungkan atau Pengadilan agama Jakarta Pusat*". See also Decision of Sangatta Religious Court No. 44/Pdt.P/2012/PA.Sgta. Sahir bin Kasim (36 years old, Moslem) and Darti binti Asis (33 years old, Moslem) both are Indonesian citizens. While they were working in Malaysia, they solemnized their marriage in Batu Sepuluh Sandakan, Malaysia on February 5, 1992 according to the Moslem Law. The fact that they were illegal workers and had no valid license hindered them to make marriage registration. After ten years, they requested the Sangatta Religious Court to determine that their marriage is valid to enable them to register their marriage. The Sangatta Religious Court considered that their marriage was solemnized in Malaysia, instead of Indonesia, therefore, it refused the request by stating that the authorized court was the Central Jakarta Religious Court, pursuant to the prevailing regulations.

[364] Masrum M. Noor, *Penetapan Pengesahan Perkawinan (Itsbat Nikah) Bagi Warga Negara Indonesia di Luar Negeri*, *Lokakarya on Kinabalu Malaysia on May 11-14, 2011.*

4 Marriage between foreigners in Indonesia

Provisions regarding a marriage between foreigners in Indonesia can be read in the Civil Administration Law[365] while MA 1974 is silent about this situation. Such marriage can be registered upon any request of the respective couple [366] and must be held according to the Indonesian laws and regulations, namely MA 1974.[367] Therefore, the couple must first have their religion's matrimony – according to the procedure stated in MA 1974 and then, marriage registration can be accomplished within sixty days.[368]

This principle is in line with the principle known in PIL, the so-called *lex loci celebrationis* meaning that any legal actions in Indonesia shall be valid if it is executed according to the local prevailing laws and regulations.

5 Interfaith Mixed Marriage

5.1 Definition of Interfaith Mixed Marriage

An interfaith mixed marriage is common in Indonesia due to the pluralism of religions and faiths in the Indonesian society. This marriage occurs between a couple who have different religion or faith. For instance, a marriage between a Moslem bride and a Christian groom or a Buddhist bride and a Hindu groom. For this marriage, scholars in Indonesia have different opinions.

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[365] Law No. 23 of 2006 regarding Civil Administration dated December 29, 2006, State Gazette No. 2006/124, Supplement No. 4674, as amended by Law No. 24 of 2013 regarding the Amendment to Law No. 23 of 2006 regarding Civil Administration, December 24, 2013, State Gazette No. 2013/232, Supplement No. 5475.

[366] Art. 35 of the Civil Administration Law. *"Pencatatan perkawinan sebagaimana dimaksud dalam Pasal 34 berlaku pula bagi: a. perkawinan yang ditetapkan oleh Pengadilan; dan b. perkawinan Warga Negara Asing yang dilakukan di Indonesia atas permintaan Warga Negara Asing yang bersangkutan."* Translation: "Marriage registration as referred to in the Article 34 shall also apply to: a. marriage stipulated by a Court; and b. marriage of a Foreign Citizen held in Indonesia at the request of the Foreigner concerned."

[367] The official elucidation of Art. 35 paragraph (b) of the Civil Administration Law. "*Perkawinan yang dilakukan oleh warga negara asing di Indonesia, harus berdasarkan ketentuan Peraturan Perundang-undangan Indonesia mengenai Perkawinan di Republik Indonesia.*" Translation: "A marriage hold by a foreigner in Indonesia, must be based on the provisions of Indonesian Laws and Regulations on Marriage in the Republic of Indonesia."

[368] Art. 34 (1) of the Civil Administration Law. "*(1) Perkawinan yang sah berdasarkan ketentuan Peraturan Perundang-undangan wajib dilaporkan oleh Penduduk kepada Instansi Pelaksana di tempat terjadinya perkawinan paling lambat 60 (enam puluh) hari sejak tanggal perkawinan.*" Translation: "(1) A marriage which is valid based on the provisions of Laws and Regulations must be reported by Citizens to the Implementing Agency at the place of marriage by no later than 60 (sixty) days as from the date of marriage."

Some scholars are of the opinion that an interfaith mixed marriage is forbidden according to Art. 2 *jo*. Art. 8 of MA 1974.[369] Art. 8 (f) of MA 1974 mentions that prohibition of the couple's religion shall prevail upon them, one of the prohibitions is interfaith marriage or having a marriage with someone who has different faith or religion. Art. 2 of MA 1974 states that a marriage can only be solemnized according to the couple's religion. In addition, Official Elucidation of Art. 2 mentions that no marriage shall be valid if it is solemnized outside of the religion law.[370] Furthermore, *Gemengde Huwelijk Regel* (hereinafter referred to as the "**GHR**") stipulates that a mixed marriage in Indonesia no longer prevails pursuant to the transitional provision of Art. 66 of MA 1974. Therefore, according to them, an interfaith mixed marriage is impossible pursuant to MA 1974.[371]

Other scholars have a different opinion. They are of the opinion that MA 1974 is silent about an interfaith mixed marriage. It only stipulates the international mixed marriage in Art. 57 of MA 1974. However, an interfaith mixed marriage appears when Art. 57 is read in conjunction with Art. 2 of MA 1974.[372] Art. 57 of MA 1974 mentions that a mixed marriage is a marriage between a couple who are subject to a different law. Art. 2 of MA 1974 describes that a couple is subject to their religious law. Based on those articles, an interfaith mixed marriage appears in the event that a couple, who have a different religion and is subsequently subject to a different religion law, enter into marriage. Based on those provisions, MA 1974 acknowledges the interfaith mixed

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[369] Art. 8 (f) of MA 1974. *"… perkawinan dilarang antara dua orang yang: … (f) mempunyai hubungan yang oleh agamanya atau peraturan lain yang berlaku, dilarang kawin."* Translation: "… a marriage shall be prohibited between two persons who: … (f) have a relationship which is prohibited by their religion or other prevailing regulations from marrying."

[370] Official Elucidation of Art. 2 of MA 1974. *"…. tidak ada Perkawinan di luar hukum masing-masing agamanya dan kepercayaannya itu, …"* Translation: "… there shall be no Marriage outside the law of the respective religion and belief, …"

[371] See various resources about the development of interfaith mixed marriage as described, among others, by Zulfa Djoko Basuki, *Hukum Perkawinan di Indonesia*, *Loc. Cit.*, pp. 82-89; Octavianus S. Eoh. *Perkawinan Antar-Agama Dalam Teori dan Praktik* (translation: Interfaith Mixed Marriage in Theory and Practice), (Jakarta: PT. RajaGrafindo Persada, 1996), pp. 10-25; Ahmad Nurcholis dan Ahmad Baso (ed.), *Pernikahan Beda Agama, Kesaksian, Argumen Keagamaan, dan Analisis Kebijakan* (translation: Interfaith Mixed Marriage, Testimonies, Religious Arguments, and Policy Analysis), 2nd ed., (Jakarta: Komisi Nasional Hak Asasi Manusia (Komnas HAM), 2010), pp. 307-329; Ratno Lukito, *The Enigma of Legal Pluralism in Indonesia Islam: The Case of Interfaith Marriage, Journal of Islamic Law and Culture Vol. 10, No. 2, July 2008,* pp. 177.

[372] Art. 57 of MA 1974 " …. *perkawinan antara dua orang yang di Indonesia tunduk pada hukum yang berlainan, ….*" Translation: " …. a marriage between two persons in Indonesia who are subject to different law*, ….*". Art. 2 of MA 1974 "*… perkawinan adalah sah apabila dilakukan menurut hukum masing-masing agamanya dan kepercayaannya itu.*" Translation: "*…* a marriage shall be valid if it is solemnized according to law of the respective religion or faith."

marriage. However, it is silent about the process of solemnization.[373] The author is of this opinion.

Therefore, pursuant the transitional provisions of MA 1974, GHR prevails whereby the difference in religion, nationality or origin shall not hinder any marriage.[374] GHR stipulates that an interfaith mixed marriage shall be solemnized according to the husband's law, except the requirement of approval from parents or guardians of the bride and groom. Such approval is a must.[375] As of 1989, the Supreme Court stated that the basic philosophy of GHR is different from the basic philosophy of MA 1974, therefore GHR should no longer be applied.[376] The Supreme Court urged the government of Indonesia to provide regulations on how to solemnize an interfaith mixed marriage. Since then, the problems of interfaith mixed marriage, in particular marriage solemnization and its registration, remain existent.

5.2 Interfaith mixed marriage in the decision of district court

There are numerous court decisions with respect to an interfaith mixed marriage. However, this paragraph will only describe the landmark decisions, whereby judge considerations and decisions became a milestone in the development of interfaith mixed marriage. The elaboration shall be followed by discussions about the efforts of interfaith mixed marriage couples to solemnize their marriage with the pro and contra arguments (Sub-chapter 3.5.3); provisions of the Civil Administration Law (Sub-chapter 3.5.4) and petitions of youngsters to the Constitutional Court (Sub-chapter 3.5.5).

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[373] H. Ichtijanto. *Perkawinan Campuran Dalam Negara Republik Indonesia, Suatu Studi ke arah Hukum yang Dicita-citakan* (translation: Mixed Marriage in the State of the Republic of Indonesia, A Study to a Desired Law). Dissertation at the Faculty of Law, Universitas Indonesia, Jakarta, 1993. Other scholars have a slightly different opinion. They are of the opinion that MA 1974 is totally silent about an interfaith mixed marriage, and an international mixed marriage is only stipulated in Art. 57 of MA 1974. Furthermore, pursuant the transitional provisions of MA 1974, GHR prevails. Therefore, an interfaith mixed marriage is possible in Indonesia. See the description from Zulfa Djoko Basuki, *Hukum Perkawinan di Indonesia*, *Loc. Cit.*, pp. 88.

[374] Art. 7 (2) of GHR. *"Perbedaan agama, bangsa atau asal itu sama sekali bukanlah menjadi halangan untuk perkawinan itu."* Translation: The difference in religion, nationality or origin shall not entirely become an obstacle for such marriage.

[375] Art. 6 (1) of GHR. *"Perkawinan campuran dilangsungkan menurut hukum yang berlaku untuk si suami, kecuali izin dari kedua belah pihak bakal mempelai, yang selalu harus ada."* Translation: A mixed marriage shall be held according to the applicable law of the husband, except for permit of both prospective spouse, which must always be existent.

[376] Consideration of Judges of the Supreme Court of the Republic of Indonesia No. 1400 K/PDT/1986 dated January 29, 1989 on the case of Andy Vony Gany vs. the State, which will be elaborated below.

One of the notable cases of interfaith mixed marriage was in 1957, namely the case of Ms. Sumarni and Mr. Medellu.[377] In this case, the Supreme Court mentioned some of the ultimate arguments in favor of the interfaith mixed marriage. First, Indonesia has plural cultures and religions and the 1945 Indonesian Constitution acknowledges such differences and freedom of faith for the protection of the Indonesian society. For the society's interest, the prohibition of interfaith mixed marriage shall not exist. If the government prohibits interfaith mixed marriage, there will be a group of illegitimate children who will have less rights than legitimate children and have no right to inherit from their father.[378] In addition, the society will marginalize them in daily life, while in actual, they are innocent. Second, for the sake of protection of Indonesian society's welfare, equality of all religions is required and the prevailing regulations shall not give priority to one religion more than the others.[379] In GHR, no religion has more priority than the other. The husband's law shall prevail, no matter what the religion is. Therefore, a religion which prevails in one particular marriage case could be different in other marriage cases.

The other case was in 1988, namely a case of Snoek Cornelis Hendrik (Buddha) vs. Siti Nur Aeni Isa (Moslem).[380] In this case, the judges followed the previous decision and used GHR as their legal basis to settle the case. Therefore, it can be concluded that GHR prevails to solemnize interfaith mixed marriages, but it was the last case which applied GHR for marriage solemnization.

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[377] Decision of the Supreme Court No. 245 K/SIP/1953 dated February 18, 1955 in the case of Ms. Soemarni (Moslem) and Mr. Medelu (Christian) vs. Soemarni's father. The case started when Sumarni's father petitioned the cancelation of marriage between his daughter, Ms. Soemarni and Mr. Medellu, held according to a Christian matrimonial ceremony. According to him, such marriage was null and void since such marriage had no approval from him as the father of the bride which is a must according to a Moslem matrimonial ceremony. However, Soemarni had the Jakarta district court's decision as approval replacing his father's approval. The Supreme Court mentioned Art. 7 (2) of GHR as the legal basis of the interfaith mixed marriage, whereby difference in religion, descendant or ancestry is not an obstacle for a marriage. The marriage of Ms. Soemarni and Mr. Medellu which was solemnized according to a Christian matrimonial ceremony was valid and according to Art. 6 (1) of GHR. The Supreme Court confirmed the decision of Jakarta District Court, the petition from Soemarni's father was refused.

[378] *Ibid.* See also Zulfa Djoko Basuki, *Hukum Perkawinan di Indonesia, Op.Cit.,* pp. 82-83.

[379] *Ibid*.

[380] Decision of the East Jakarta District Court No. 151/PDT/P/1988/PN.JKT.TIMUR dated March 21, 1988. The request to marry before the Religious Affairs Office and Vital Records Office was refused. The couple submitted their request to the East Jakarta District Court to give its permission to have marriage registration at Jakarta Marriage registration Office and state that the refusal of both offices had no reasonable ground. In the considerations, judges considered the transitional provision of MA 1974 and appointed GHR as its legal ground to approve the request and then gave order to Jakarta Vital Records Office to register the interfaith mixed marriage.

Another notable case is a Decision of the Supreme Court in 1989, namely the case of Andy Vony Gani vs. the State.[381] In this case, another development of interfaith mixed marriage was made.[382] The Judge of the Supreme Court stated that MA 1974 does not mention that an interfaith mixed marriage is forbidden. In addition to the above, the judges of the Supreme Courts mentioned that the transitional provisions of Art. 66 of MA 1974 leads to the application of Art. 7 (2) of GHR in relation to marriage solemnization. However, the Supreme Court considered that MA 1974 has a profound enormous different ground philosophy compared to GHR, HOCI, and BW. MA 1974 has a close relationship with religion's divine values, and stipulates that a marriage must be according to the religion. In other words, no marriage can be established without the religion's law,[383] while a Marriage Registration Office has no authority to solemnize a marriage. The ground of MA 1974 makes it is incompatible with GHR, whereby it only covers provisions on the aspect of civil matters of marriage.[384] Therefore, GHR shall no longer be applied.

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[381] Writers and or observers of the marriage law (in particular interfaith mixed marriage) after 1990 always referred to this case, among others, Sudargo Gautama, *Himpunan Jurisprudensi Indonesia yang Penting untuk Praktek Sehari-hari Jilid 8*, (Bandung: Citra Aditya Bakti, 1995), Zulfa Djoko Basuki, *Hukum Perkawinan di Indonesia*, *Loc. Cit.,* pp. 84-88; Ratno Lukito (in some of his writings, one of them namely)*, Trapped between Legal Unification and Pluralism, The Indonesian Supreme Court's Decision on Interfaith Marriage*, in Gavin W. Jones, Chee Heng Leng, Maznah Mohamad (Ed.), *Muslim-Non-Muslim Marriage, Political and Cultural Contestations in Southeast Asia*, (Singapore: ISEAS-Yusof Ishak Institute, 2009), pp. 33-58

[382] Case of Andy Vonny Gany (Moslem) and Petrus Nelwan (Christian) vs. the State. (Decision of the Central Jakarta Court No. 382/PDT/P/1986/PN.JKT.PST. dated April 11, 1986 *jo*. Decision of the Supreme Court of the Republic of Indonesia No. 1400 K/PDT/1986 dated January 29, 1989.

This decision of the Supreme Court was followed by Indonesian judges for the same cases. The registration of Andi Vony Gani and Petrus Nelwan was the last couple of interfaith mixed marriage which registered in the CRO, particularly in the region of DKI Jakarta due to the issuance of Instruction Letter No. 3614/075.52 dated December 30, 1988 issued by the CRO of DKI Jakarta. The letter stated that CRO of DKI Jakarta, as of January 1, 1989 will only register a marriage which has already been legalized or held according to their religion or belief (after the couple hold their marriage at the church, monastery or temple). The exception was made for a landmark case namely of Andi Vony Gani vs. Petrus Nelwan which was issued on January 20, 1989 since the case started as of 1986 before the issuance of the CRO Instruction Letter. See Zulfa Djoko Basuki, *Hukum Perkawinan di Indonesia, Op.Cit.,* p. 89.

[383] It refers to the Official Elucidation of Art. 2 of MA 1972. The judge of the Supreme Court was of the opinion that authority of the Vital Records Office is merely to register important events of Non-Muslim people. See Art. 1 (2) of Presidential Decree No. 12/1983 dated February 12, 1983 which prevailed at that time.

[384] In relation to the scope of GHR and BW, Wirjono Prodjodikoro describes excellently in *Bahasa* about the background of marriage law in BW. He states that legislators (at that time) understood that a marriage has various aspects. Therefore, they chose and preferred to regulate a marriage in a particular latitude, namely the civil relationship and legal aspect between a man and a woman in their marriage. This writing provides a different ambiance and understanding while other writings directly mention that GHR and BW only cover the civil and legal aspect of marriage. See Wirjono Prodjodikoro, *Hukum perkawinan di Indonesia, Loc. Cit.*, pp. 7-9.

Furthermore, the judges stated the fact that MA 1974 is silent about an interfaith mixed marriage is not ideal for Indonesian pluralistic society. The problem of interfaith mixed marriage will still exist side by side with the existence of pluralism itself. Therefore, the judges stated that the Government of Indonesia must provide a reasonable resolution for interfaith mixed marriage. The Supreme Court also stated the fact that a bride choosing to have her marriage registered with a Vital Records Office shows that she had set aside her religion law. Therefore, the prohibition stated in Art. 8 of MA 1974 does not apply to her and the Vital Records Office must register their marriage.

The considerations and arguments above are repeated in many writings in favour of the interfaith mixed marriage, although the opposition of those arguments still also exists. The author honours and supports the consideration of Judges of the Supreme Court above, although their considerations were stated a long time ago, and they are still relevant to this date.

5.3 Solemnization of Interfaith Mixed Marriage

There are four approaches for an interfaith mixed marriage couple to have their marriage solemnized.[385] First, the couple conducts two matrimonial ceremonies, according to each religion of the bride and the groom. Other couples have another approach. One of them changes his or her faith so that they have the same faith temporarily for the sake of solemnization. After the solemnization, he or she will re-confess his previous faith.[386] Some couples have their marriage solemnized according to a third applicable law; namely a foreign law by going abroad or according to Faith in the Almighty God which is permissive and allows an interfaith mixed marriage (in Indonesia). As for the last approach, interfaith mixed marriage couples shall request a district court decision for solemnization.[387] The first three solemnizations or formalizations of interfaith marriage

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[385] This part is taken from many writings, sources and then is composed to describe the solemnization of interfaith mixed marriage. Those writings are, among others, Zulfa Djoko Basuki, *Hukum Perkawinan di Indonesia*, *Loc. Cit.*, pp. 89-97. Octavianus S. Eoh, *Loc. Cit.,* pp. 127-147. Hukumonline, *"Empat Cara Penyelundupan Hukum Bagi Pasangan Beda Agama"* presented by Wahyono Darmabrata, the report is available at http://www.hukumonline.com/berita/baca/hol15655/empat-cara-penyelundupan-hukum-bagi-pasangan-beda-agama, last accessed on March 23, 2015. See also testimonies of interfaith mixed marriage in Ahmad Nurcholis and Ahmad Baso (Ed.), Loc. Cit., pp. 19-209.

[386] See also the summary of identification of issues in interfaith mixed marriage as described in Ahmad Nurcholis and Ahmad Baso (Ed.), pp. 210-237.

[387] Indonesia, Decision of the Constitutional Supreme Court No. 68/PUU-XII/2014, p. 5. These approaches slightly differ from the approaches mentioned in Decision of the Constitutional Supreme Court No. 68/PUU-XII/2014. Petitioners stated that an interfaith mixed marriage couple usually conduct their marriage through legal fraudulent *(penyelundupan hukum)* by overruling the national law or overruling the religion law. The interfaith mixed marriage couple overrule the national law by solemnizing their marriage abroad or marry according to the *Adat* Law. They overrule the religion law by submission to the religion of his/her partner, or convert his/her faith before or at the time of the matrimonial ceremony. The two options can be considered the

have their risk, argument and questions, the last one has a longer procedure than the usual. Below, we will start the discussion.

5.3.1 Two Matrimonial Ceremonies

The first approach is that a couple have their marriage solemnized twice, according to each religion of the bride and groom. For instance, a couple have marriage matrimonial ceremony at a mosque in the morning and then at a church in the afternoon or vice versa. This approach is based on Art. 2 of MA 1974 which states that a marriage must be according to the law of each religion.[388] The word "each" or in *Bahasa "masing-masing"* is interpreted to refer to each religion of both of the bride and groom.

This approach leads to a question: which one is the applicable law which validates the marriage, the first matrimonial ceremony or the second matrimonial ceremony? A decision of the district court shows that the law of the second matrimonial ceremony applies to validate the marriage. It is based on the thoughts that the couple does not consider the first one is legitimate, thus they need to have the second solemnization.[389] In practice, the validity of both marriage certificates become the first question in the process of divorce before the court and there is no precise answer for this question.

5.3.2 Temporarily subordination

The approach is made when one of the spouses follows his or her counterpart's faith or religion temporarily. He or she confesses to have the same religion as his or her partner for the sake of marriage registration (only). He or she will re-confess his or her previous faith or religion after the marriage is legally registered or solemnized. For instance, a Moslem bride confesses to be a Christian, so she will have the same religion with the groom. With the same religion, the couple can register their marriage with a Vital Records Office or Religious Affairs Office. After marriage registration, she re-confesses to be a Moslem and redo the Moslem obligations and prayers.[390] In other words, the

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same. First, the couple go abroad. Second, the respective couple is subject to one religion law, at least at the time of solemnization. The marriage solemnization according to the Adat Law or Faith in the Almighty God (*Kepercayaan Tuhan Yang Maha Esa*) is relatively new.

[388] Art. 2 of MA 1974. "*Perkawinan … dilangsungkan menurut hukum masing-masing agamanya dan kepercayaannya itu.*" Translation: "A marriage … shall be held according to the religion and faith of each of them." (underline as emphasis is from the author).

[389] H. Ichtijanto. *Perkawinan Campuran Dalam Negara Republik Indonesia, Suatu Studi ke arah Hukum yang Dicita-citakan* (translation: Mixed Marriage in the State of the Republic of Indonesia, A Study to a Desired Law), Dissertation, (Jakarta: University of Indonesia, 1993).

[390] Ahmad Nurcholis dan Ahmad Baso (ed.), *Loc. Cit.*, p. 40 and p. 145. The stories of interfaith mixed marriage couples to have their marriage solemnized: (1) Wardah (Moslem) and Wiladi (Catholic); (2) Arum (Catholic) and Permadi (Moslem), etc.

conversion of faith from one of the spouses is only temporary and only for the sake of marriage solemnization and its registration.

Objection to this approach appears that the conversion for the sake of marriage registration is against the freedom of faith. This situation will be different if the respective person converts his or her faith based on his or her own free will. But if the conversion comes only for the sake of marriage registration, he or she can be accused of committing a fraud which leads to a question: whether or not the marriage is legally established.[391] In addition, the suppress from marriage registration, is against the Indonesian Constitution, particularly the freedom of faith as referred to in Art. 29 (2) of the Indonesian Constitution.[392] In addition, the deadlock situation of interfaith mixed marriage is not in line with the constitutional right to establish a family as provided in Art. 28B (1) of the Indonesian Constitution.[393]

5.3.3 Marriage according to a third applicable law

The first and most popular approach is about a couple who travels abroad and then solemnizes their marriage, according to the local prevailing laws and regulations. After the couple returns to Indonesia, they will register their marriage pursuant to Art. 56 of MA 1974 whereby such marriage shall be treated as a marriage held abroad than an interfaith mixed marriage.[394]

In addition to be costlier, this approach can be considered as a fraudulent point of contact *(penyelundupan hukum)*. The couple can be considered as avoiding the prohibition of their own religion (if any and relevant), which makes them illegible to marry. The worst

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[391] According to the Islamic Law, one of the grounds of divorce is if a husband or wife converts to another religion so he or she is no longer Moslem. In this situation, the spouse can request divorce from one-side only. This situation is unjust for the person who converts his or her faith, as the couple must be understood from the first place that the conversion or subordination is only for the sake of marriage solemnization.

[392] *The State shall guarantee the freedom of each resident to practice their respective religion and to worship according to his/her own religion and belief*. Art. 29 (2) of the Indonesian Constitution "*Negara menjamin kemerdekaan tiap-tiap penduduk untuk memeluk agamanya masing-masing dan untuk beribadat menurut agama dan kepercayaannya itu.*"

[393] Art. 28B (1) of the Indonesian Constitution "*Setiap orang berhak membentuk keluarga dan melanjutkan keturunan melalui perkawinan yang sah.*" Translation: "Every person shall be entitled to establish a family and continue descendants by a valid marriage."

[394] "*Perkawinan yang dilangsungkan di luar Indonesia antara dua orang warga negara Indonesia atau seorang warga Negara Indonesia dengan warga Negara Asing adalah sah bilamana dilakukan menurut hukum yang berlaku di Negara di mana perkawinan itu dilangsungkan dan bagi warga Negara Indonesia tidak melanggar ketentuan-ketentuan Undang-undang ini.*

Dalam waktu 1 (satu) tahun setelah suami istri itu kembali di wilayah Indonesia, surat bukti perkawinan mereka harus didaftarkan di Kantor Pencatatan Perkawinan tempat tinggal mereka."

consequences can be the nullification of marriage, which will prejudice the couple, husband and wife.

As to whether or not this kind of marriage is valid, Indonesian scholars have different thoughts. The majority of Indonesian scholars are of the opinion that such marriage is not valid since the couple go abroad to avoid Indonesian regulations which prohibit the interfaith mixed marriage. It is in line with the principle of "*fraus omnia corrumpit*", whereby the fraudulent point of contacts shall be nullified from the start including the legal consequences.[395]

The other opinion is contradictory. According to them, these marriages are valid. The marriage is merely a marriage which is held abroad. The fact that the couple have a different faith, has no impact on the validity of marriage since the marriage is solemnized according to the foreign law.[396] The author supports the latter opinion. That marriage should be considered valid. First, MA 1974 states that the validity of marriage held abroad depends on the local regulation where the marriage is held, provided that the marriage must be in accordance with MA 1974. The author would like to quote the consideration of the Supreme Court of Indonesia in the case of Andy Vony Gani whereby it states that MA 1974 does not regulate interfaith mixed marriages. In addition, the prohibition of religion law of the couple (if relevant) shall not prevail if the couple choose to subject to another law. In this case, the respective person can be considered to have deserted his or her religion law on his or her own freewill.[397] The government or civil registration office should respect the option chosen by the respective groom or bride.

The second approach is to solemnize a marriage through a third domestic applicable law. There was a couple who solemnized their marriage according to Faith in the Almighty God (*Aliran Kepercayaan Kepada Tuhan yang Maha Esa*). Since this marriage occurred recently (in 2010), a court decision with regards to this approach does

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[395] One of them is Zulfa Djoko Basuki, *Hukum Perkawinan di Indonesia*, *Loc. Cit.*, pp. 94-97. In relation to the fraudulent point of contact, see Sudargo Gautama, *Pengantar Hukum Perdata Indonesia, Loc. Cit.*, pp. 167- etc.

[396] Sri Wahyuni, *Loc. Cit.*, pp. 241, 245-291. See also interesting data on how the Indonesian society response to interfaith mixed marriages, in particular those solemnized abroad. The data is described by Sri Wahyuni in her chapter of *Aspirasi Masyarakat Indonesia tentang Perkawinan WNI Beda Agama di Luar Negeri* (Translation: Aspiration of Indonesian Society regarding the Interfaith Mixed Marriage between Indonesian Citizens Abroad). The society are permissive by 38-44% and un-permissive by 48%-54%. She concludes that the Indonesian society is relatively lenient to interfaith mixed marriage. See pp. 290-291.

[397] The Supreme Court also states the fact that the bride choosing to have her marriage registered with a Marriage Registration Office shows that she set aside her religion law. Therefore, the prohibition stated in Art. 8 of MA 1974 does not apply to her and the Marriage Registration Office must register their marriage."

not exist yet. The author predicts that the common opinion to the same will be similar as the first approach, the marriage is not valid.

5.3.4 Marry through a district court decision

This approach is made pursuant to Art. 21 of MA 1974.[398] Refusal of a registration office to register a marriage becomes the ground for a couple to request the authorized district court to revoke the refusal. Further, they will request the court to order the civil registration office to continue the marriage solemnization concerned. The refusal letter of marriage registration office is issued because the officer believes that there is a ground for refusal, among others, the bride or groom does not comply with the substantive requirements as referred to in MA 1974.

In relation to the refusal of marriage registration office, some scholars argued that Art. 20 and Art. 21 of MA 1974 show an understanding that a marriage registration office actually has the authority to hold marriages, not only to register marriages. Art. 20 of MA 1974 mentions that a registration office officer is prohibited from holding a marriage or from assisting a marriage in the event that he/she is aware of a violation of the substantive requirements as referred to Art. 7 (1), Art. 8, Art. 9, Art. 10 and Art. 11 of MA 1974. Art. 21 (1) of MA 1974 mentions that if an officer is in the opinion that there is a prohibition on such marriage, he/she may refuse to hold such marriage. Scholars refer to the words "to hold a marriage" as the basis for a registration office's authority which includes more authority other than registration purpose only.[399]

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[398] Art. 21 of MA 1974. *"(1) Jika pegawai pencatat perkawinan berpendapat bahwa terhadap perkawinan tersebut ada larangan menurut undang-undang ini, maka ia akan menolak melangsungkan perkawinan. (2) Di dalam hal penolakan, maka permintaan salah satu pihak yang ingin melangsungkan perkawinan oleh pegawai pencatat perkawinan akan diberikan suatu keterangan tertulis dari penolakan tersebut disertai dengan alasan-alasan penolakannya. (3) Para pihak yang perkawinannya ditolak berhak mengajukan permohonan kepada pengadilan di dalam wilayah mana pegawai pencatat perkawinan yang mengadakan penolakan berkedudukan untuk memberikan keputusan, dengan menyerahkan surat keterangan penolakan tersebut di atas. (4) Pengadilan akan memeriksa perkaranya dengan acara singkat dan akan memberikan ketetapan, apakah ia akan menguatkan penolakan tersebut ataukah memerintahkan, agar supaya perkawinan dilangsungkan. (5) Ketetapan ini hilang kekuatannya, jika rintangan-rintangan yang mengakibatkan penolakan tersebut hilang dan para pihak yang ingin kawin dapat mengulangi pemberitahuan tentang maksud mereka."* Translation: "(1) If a marriage registration officer is of the opinion that there is prohibition of marriage according to this law, he/she shall refuse to hold the marriage. (2) In case of refusal, with respect to the request of one of the parties who intend to hold a marriage, a marriage registration officer shall give a written information on the refusal along with the reasons for refusal. (3) Parties whose marriage is refused shall be entitled to submit a petition to a court of the area in which the marriage registration officer making the refusal is domiciled to give a decision, by delivering the above-mentioned information on refusal. (4) A Court shall examine the case by brief procedure and shall give a stipulation whether it will support the refusal or order the marriage to be held. (5) The stipulation shall lose its force if the obstacles causing such refusal are removed and the parties who intend to marry may repeat the notification of their intention."

[399] This debate was ended since the promulgation of the Civil Administration Law. Art. 34 and Art. 35 of the Civil Administration Law require every marriage to be registered, including a marriage established through a

In some cases, a request for interfaith mixed marriage is refused by a district court.[400] It prejudices the right of a couple to establish a family through a valid marriage, as referred to in Art. 28B (1) of the Indonesian Constitution.[401] The couple can appeal to a higher level court, the high court or event to the supreme court. In the event that the court confirms that the marriage could be solemnized, the process of marriage will proceed. This process takes time as well as expenses which prejudice the respective couple, although in the end, this process gives more legal certainty. However, the additional time and cost spent by the respective couple already prejudice them compared to ordinary couples.

The four approaches above with their consequences lead us into a conclusion that interfaith mixed marriages need to be regulated.

5.4 Civil Administration Law

Promulgation of the Civil Administration Law gives modest fresh air in relation to interfaith mixed marriages.[402] Art. 35 of the Civil Administration Law stipulates that the marriage registration obligation is also applied to a marriage which is determined by a district court. In its Official Elucidation, it states that an interfaith mixed marriage is included as a marriage based on district court decisions.[403]

The Civil Administration Law indicates that it is possible to solemnize an interfaith mixed marriage in Indonesia. In relation to this, two questions appear. First, consistency

district court decision, for instance an interfaith mixed marriage. Therefore, based on these provisions, registration of interfaith mixed marriage can be conducted through a district court decision.

[400] See decisions of the district court (among others) No. 527/Pdt/P/2009/PN/Bgr and No. 375/Pdt.P/2013/PN.Ska. See also article Hukumonline, "*Pengadilan Belum Seragam dalam Memandang Nikah Beda Agama*" (translation: Courts Not Yet Have a Common Opinion of Interfaith Mixed Marriage) available at http://www.hukumonline.com/berita/baca/lt565c049ed65ba/pengadilan-belum-seragam-dalam-memandang-nikah-beda-agama , last accessed on January 26, 2018.

[401] Art. 28B (1) of the Indonesian Constitution. Translation: "Every person shall be entitled to establish a family and continue descendants by a valid marriage."

[402] This part only discusses the situation after the promulgation of the Civil Administration Law. There are comprehensive and complete writings in respect of Civil Registry Office's opinion on the registration of interfaith mixed marriage prior the promulgation. Basically, it refuses to solemnize and register an interfaith mixed marriage because it has no legal basis to solemnize the marriage, since it is the authority of the religious leaders (*penghulu,* priest or pastor, etc.). Further, it has no list of interfaith mixed marriages. See Zulfa Djoko Basuki, *Hukum Perkawinan di Indonesia, Loc. Cit.*, pp. 87-93; Octavianus S. Eoh, *Loc. Cit.,* pp. 138-147.

[403] Art. 35 of the Civil Administration Law. *"Pencatatan Perkawinan sebagaimana dimaksud dalam Pasal 34 berlaku pula bagi (a) perkawinan yang ditetapkan oleh Pengadilan; dan (b) perkawinan Warga Negara Asing yang dilakukan di Indonesia atas permintaan Warga Negara Asing yang bersangkutan. Penjelasan: Huruf (a) Yang dimaksud dengan "Perkawinan yang ditetapkan oleh Pengadilan" adalah perkawinan yang dilakukan antar-umat yang berbeda agama. Huruf (b) Perkawinan yang dilakukan oleh Warga Negara Asing di Indonesia, harus berdasarkan ketentuan Perundang-undangan Indonesia mengenai perkawinan di Republik Indonesia."*

as to whether or not the court will revoke or confirm the refusal of marriage of a Marriage Registration Office or Religion Affairs Office. In reality, there are some district courts which confirm the refusal of marriage solemnization, while the other do the opposite.

The second question is about the applicable law to establish the marriage, the religion law of the husband or wife? Or both? To answer the question above, the author would like to refer to the case of Andy Vony Gani. In this case, the judges state that when a bride chose a Marriage Registration Office, she shows her intention to prefer to being subject to another law, instead of her own law. According to the author, it also answers the question what is the law applicable to the marriage.

Based on the above, at least, there are some facts we can collect. First, interfaith mixed marriages exist and can be registered in Indonesia, although the process takes more time than the others. Consideration of the judges of the Supreme Court in the case of Andy Vony Gany stating that the government of Indonesia should respond to this situation due to pluralism within the society in Indonesia remains valid. The Government has to provide a reasonable solution.

5.5 Decision of the Constitutional Supreme Court on Interfaith Mixed Marriage

In 2014, a group of youngsters brought this case to the Constitutional Supreme Court. They requested a judicial review of MA 1974, in particular, Art. 2, against the Indonesian Constitution, namely the right of religion (stated in Art. 28E (1), (2), Art. 28I (1) and Art. 29 (2)), the right to have a valid marriage (as referred to in Art. 28B (1)), the right to have a legal certainty (as referred to in Art. 28D (1), and the right to be equal before the law and free from any discriminative action (as referred to in Art. 28I (2)).[404]

They petitioned that Art. 2 of MA 1974 to be added by a phrase *"sepanjang penafsiran mengenai hukum agamanya dan kepercayaannya itu diserahkan kepada masing-masing calon mempelai."* Translation: "insofar as the interpretation of law of their religion and faith shall be according to the understanding of the respective prospective spouse".[405] They petitioned that an interfaith mixed marriage is allowed due to the plural society in Indonesia and that the government is not in the position to be a "judge" of religion and faith and precludes an interfaith mixed marriage by not providing reasonable regulations on the same.

[404] Indonesia, Decision of the Constitutional Supreme Court No. 68/PUU-XII/2014, pp. 15-16.

[405] *Ibid.,* pp. 5-6.

The Constitutional Supreme Court refused the petition. The judges are of the opinion that religion serves as the basis for community and individuals in having a relationship with the Almighty God. According to the judges, the government has the legitimacy to provide laws and regulations in order to give a legal certainty in the society, in this case, marriage. Religion is the basis for validation and determines the validity of marriage; while its administration is conducted by the government.[406]

The concurring opinion comes from respectable constitutional Judge Maria Farida Indrati. She is of the opinion that MA 1974 constitutes a significant effort to codify and unify the marriage law in Indonesia. The codification and unification of marriage law may not provide a just and legal certainty to everybody, in particular, in terms of interfaith mixed marriage. She states that there are two concerns, religion as the basis for marriage and State as the regulator. Unfortunately, MA 1974 has placed interfaith mixed marriage in a dilemma; but, according to her, this situation needs more settlement than an amendment to the requested phrase or words in Art. 2 of MA 1974. If the Constitutional Supreme Court grants the petition, it will add more problems rather than giving a settlement. Interpretation according to the prospective spouse which is allowed by MA 1974 must be extremely vary. Thus, it will not solve the problem.[407]

In the proceeding of the Constitutional Supreme Court, religious scholars and leaders gave their testimonies, opinions and statements on interfaith mixed marriage. Apparently, not all religions in Indonesia prohibit an interfaith mixed marriage.[408] Some of them totally refuse an interfaith mixed marriage, while some of them are of the opinion that it is possible with particular notes or requirements. It appears that an interfaith mixed marriage is acceptable although it is not an ideal marriage according to the teachings or doctrines of any religion and or faith.[409]

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[406] Indonesia, Decision of the Constitutional Supreme Court No. 68/PUU-XII/2014, pp. 152-153.

[407] *Ibid.,* pp. 155-162.

[408] See Law No. 1/PNPS/1965, the official elucidation of Art. 1 paragraph 1 and 2 *"… Agama-agama yang dipeluk oleh penduduk di Indonesia ialah Islam, Kristen, Katolik, Hindu, Budha dan Kong Hu Chu (Confusius). Hal ini dapat di buktikan dalam sejarah perkembangan agama-agama di Indonesia. Karena enam macam agama ini adalah agama-agama yang dipeluk hampir seluruh penduduk Indonesia, maka kecuali mereka mendapat jaminan seperti yang diberikan oleh Pasal 29 ayat 2 UUD, juga mereka mendapat bantuan-bantuan dan perlindungan seperti yang diberikan oleh pasal ini."* However, such provision does not prohibit the existence of any other religions in Indonesia. Other religions have protection according to Art. 29 (2), provided that they do not contradict the prevailing laws and regulations. See the official elucidation art. 1 paragraph 3 "*Ini tidak berarti bahwa agama-agama lain, misalnya Yahudi, Zarasustrian, Shinto, Taoisme dilarang di Indonesia. Mereka mendapat jaminan penuh seperti yang diberikan oleh Pasal 29 ayat 2 dan mereka dibiarkan adanya asal tidak melanggar ketentuan-ketentuan yang terdapat dalam peraturan ini atau peraturan perundangan lain*".

[409] Minutes of Meeting of the Constitutional Supreme Court of the Republic of Indonesia No. 68/PUU-XII/2014 dated November 5, 2014 regarding Judicial Review of MA 1974 against the Indonesian Constitution,

Islam was represented by *Majelis Ulama Indonesia* (Indonesian Ulema Council- MUI) and *Pengurus Besar Nahdlatul Ulama* (Supreme Council of Nahdlatul Ulama-PBNU). Those Islamic religious leaders have different opinions, but they ended on the same conclusion: refusing the petition of the petitioners. MUI pointed out, among others, efforts of the drafters and Indonesian Council at that time to have Art. 2 of MA 1974 and mentioned that Art. 2 is the center of religious values of MA 1974 as the grounds.[410] PBNU mentioned some perspectives of interfaith mixed marriage in Islam. Although PBNU is aware of some opinions allowing an interfaith mixed marriage, PBNU is of the opinion to refuse an interfaith mixed marriage.[411] According to PBNU, a Moslem man is not allowed to marry a non-Moslem woman because it is almost impossible to request a wife to convert her faith into Islam. However, there are some other ways to do "*da'wah*"[412], besides a marriage. Indonesia has a lot of Moslem women, thus a Moslem man should have no difficulty to find his right wife. In addition, consequences on the family's daily life will be too complicated for the couple of interfaith mixed marriage, among others, faith education towards children, diet of food, etc.

Christian religion was represented by *Persekutuan Gereja-gereja di Indonesia* (Council of Churches in Indonesia- "**PGI**"). Due to pluralism within the Indonesian society, PGI particularly asked that MA 1974 could be revised to provide provisions in favour of interfaith mixed marriage.[413] In addition to such opinion, there were some Christian

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Agenda: opinions of MUI, PBNU, WALUBI and PGI (V). There are some writings and discussions about the opinion on interfaith mixed marriage pursuant to major religions in Indonesia, among others, Octavianus S. Eoh, *Loc Cit.,* pp. 117-125; Sri Wahyuni, *Loc. Cit.,* pp. 98-121. Although the results do not have any difference, the author mostly took opinions from the proceeding of the Constitutionalwere more recent.

[410] *Ibid.,* pp. 5-12.

[411] *Ibid*., pp. 13-16. See also Art. 40 and Art. 44 of the Compilation of Islamic Laws circulated through Presidential Instruction No. 1 of 1991. Art. 40 *"Dilarang melangsungkan perkawinan antara seorang pria dengan seorang wanita karena keadaan tertentu: (c) seorang wanita yang tidak beragama Islam."* Art. 44 "*Seorang wanita Islam dilarang melangsungkan perkawinan dengan seorang pria yang tidak beragama Islam.*" Prohibition in the Compilation of Islamic Laws becomes a standard of the Religions Affairs Office to refuse an interfaith mixed marriage.

[412] "*Da'wah*" means Moslem missionary endeavor.

[413] *Ibid*., page 16-22. PGI stated that Art. 2(1) of MA 1974 has created its own irony. PGI was in the opinion that Art. 2 of MA 1974 ignores the pluralism and diversity of Indonesian citizens and the universality of love which knows no skin, descendant, culture or religion. Therefore, Art. 2 (1) should be read and interpreted in the spirit of unity and diversity as mentioned in the coat of arms of the Republic of Indonesia *"Bhinneka Tunggal Ika"* to serve the Indonesian multicultural society. (Garuda in the Indonesian coat of arms holding a ribbon where "*Bhinneka Tunggal Ika*" is written. It is an ancient Javanese language which means "diversity in unity". Diversity is the reflection of pluralism and cultures which live in variety in Indonesia.) This article is interpreted narrowly so that interfaith mixed marriage couples have no option and are led to cohabitation without any marriage, which is taboo in Indonesia, or resort to subordination to another religion temporarily or pretention. While this article was initially made to preserve purity of the spiritual side of the couple. The interpretation has led to moral and spiritual aberration due to a marriage registration office's refusal of interfaith mixed marriage. In addition to it, this interpretation also violates justice because theologically the couple who

leaders who refuse an interfaith mixed marriage.[414] Some of them stated that it is permissible on certain conditions because it is considered as a non-ideal marriage.[415] Each opinion was supported by arguments and verses from the Holy Bible.

Opinion of the Catholic religion was represented by *Konferensi Waligereja Indonesia* (Bishops' Conference of Indonesia-KWI). It stated that the religion and faith referred to in Art. 2 of MA 1974, are interpreted *de facto* only to recognized religions and faiths existing in Indonesia. This limitation restricts a person who can only choose one of the recognized religions and faith. In fact, the agent (of registration office) sometimes suppresses a person to choose a religion recognized by the State. In this case, the State exceeds its authority since relationship with God is a very personal area. Further, when two persons with different faith have the intention to marry or marry according to one religion, the officer suppresses the other to change his or her faith in order to obtain marriage registration service. Both of the right to marry and the right to believe must be respected. When both fundamental rights encounter each other, none of them shall be sacrificed. Therefore Art. 2 of MA 1974 should be revised.[416]

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have different faith should not be prevented from getting married. Interpretation of Art. 2 (1) has caused injustice. Wealthy couple can go abroad to solemnize their interfaith mixed marriage, while other couples cannot do it. In addition, PGI considers that the registration office has exceeded its authority since it intervenes with marriage validity. The registration office's task is only to register a valid marriage. In fact, the registration office refuses to make marriage registration even though such marriage has been validated according to a certain faith or religion. Therefore, PGI requests that the reality of pluralism or multiculturalism in the Indonesian society should be prioritized and be accommodated in the marriage laws and regulations.

[414] Religious leaders refer the Old Testament, particularly Ezra 9-10; Nehemiah 13:23-29; Malachi 2:10. Prohibition is stated explicitly in Deuteronomy 7:3-4. In the New Testament, prohibition is also mentioned in 2 Corinthians 6:14-16.

[415] Religious leaders refer 1 Corinthians 7:12-16 whereby according to the pastors and scholars, these verses state the opportunity to have an interfaith mixed marriage with some requirements. See also Procedure of PGI, Art. 29:9.b, as well as the opinion of *Pdt*. Purboyo W. Susilaradeya, priest at *Gereja Kristen Indonesia* (GKI) Pondok Indah at http://gkipi.org/pernikahan-beda-agama-dalam-perspektif-gki/ accessed on April 2, 2015. Based on those verses, GKI gives a chance to its congregation to have an interfaith mixed marriage with certain conditions.

[416] Minutes of Meeting of the Constitutional Supreme Court of the Republic of Indonesia No. 68/PUU-XII/2014 dated November 24, 2014 regarding Judicial Review of MA 1974 against the Indonesian Constitution, Agenda: opinions of KWI, PDHI, and MATAKIN (VI), pp. 2-5. The Catholic Church sees that a marriage between catholic and non-catholic person is not an ideal marriage. A marriage in Catholic is a holy and sacred sacrament. According to the Canon of Catholic Church, there are impediments of marriage, for instance one of the couples is married (Canon 1085), any existence of physical, psychological or social pressure or coercion (Canon 1089 and 1103), and also different church (Canon 1124) as well as religion (Canon 1086). An interfaith mixed marriage can only be held by dispensation from a local Ordinary or Bishop (Canon 1124). Therefore, it can be concluded that an interfaith mixed marriage is not entirely prohibited in Catholic Church.

The Highest Council of Hindu Congregation, referred to as *Majelis Tertinggi Umat Hindu*, known as *Parisada Hindu Dharma Indonesia* (PHDI) stated that an interfaith religion is exclusively prohibited.[417]

The second group which is in the opposite side of the previous religion is Buddha and Confucianism. Buddha[418] and Confucianism[419] directly allow an interfaith mixed marriage in their congregations.

In the hearing of the Constitutional Supreme Court, religious leaders explicitly stated that an interfaith mixed marriage is not an ideal marriage or an advisable marriage. However, they cannot prohibit such phenomenon in the society. This legal vacancy is absurd and in contradiction since the Indonesian Constitution states that establishing a

[417] *Ibid.*, pp. 6-12. PDHI gave a testimony that Indonesian Hindu does not recognize any interfaith mixed marriage. In Hindu, a matrimonial ceremony can only be performed if both bride and groom are Hindus. Otherwise, the bride should follow a religious ceremony as a confession to have Hindu's faith., namely *sudhi vadani* ceremony. The peak of Hindu matrimonial ceremony, called as *Vivaha Samskara,* is the mantra or prayer as commitment of the couple to live together, leaded by *Pendita* or designated priest. In Indonesia, the matrimonial ceremony is followed by marriage registration according to MA 1974. The final ceremony is *Majauman* which is a ceremony to excuse newly wife to depart from her family and ancestors to follow her husband. The ceremonies are sacral since they are performed according to the Hindu's Holy Bible, *Susatra Veda*. Therefore, Pandita or the leader of ceremony will not perform the matrimonial ceremony if a bride or groom has not confessed Hindu's faith. In relation to this matter, PDHI referred to the book *Manu Smerti Adhyaya* V (Chapter V) Sloka 89 stating that holy water shall not be given to them who ignore the designated ceremony.

[418] Minutes of Meeting of the Constitutional Supreme Court of the Republic of Indonesia No. 68/PUU-XII/2014 dated November 5, 2014 regarding Judicial Review of MA 1974 against Indonesian Constitution, Agenda: opinions of MUI, PBNU, WALUBI and PGI (V), pp. 22-23. The Chairman of the Representatives of Indonesian Buddhist Congregation *(Perwakilan Umat Buddha Indonesia "Walubi")*, Mr. Suhadi Sendjadja, in proceeding of the Constitutional Supreme Court gave a testimony that a marriage happens because initially there is fate from their past between the couple which is very strong and deep. In this situation, Buddha is not in a position to refuse or receive such fate even if the couple has an interfaith mixed marriage. A marriage is an event in human's life to choose, as an expression of his or her freedom. Buddha encouraged his congregation to marry another member who has the same religion. But if someone chooses to marry another person who has a different religion, Buddha still provides the facility. An interfaith mixed marriage is permissible according a Decision of the *Sangha Agung Indonesia*, provided that such marriage is solemnized according to Buddhist matrimonial ceremony. In this ceremony, a couple who are non-Buddhist do not need to profess Buddha's faith. However, in the matrimonial ceremony, the respective couple must profess "in the name of Sang Budha, Dharma and Sangka." See Minutes of Meeting of Proceeding No. 68/PUU-XII/2014 dated November 5, 2014.

[419] Minutes of Meeting of the Constitutional Supreme Court of the Republic of Indonesia No. 68/PUU-XII/2014 dated November 24, 2014 regarding Judicial Review of MA 1974 against the Indonesian Constitution, Agenda: opinions of MUI, PBNU, WALUBI and PGI (VI). pp. 12-14. Religious leaders referred to as *Presidium Dewan Rohaniwan dan Dewan Pengurus Majelis Tinggi Agama Khonghucu Indonesia (Matakin)* dated November 18, 2014 stated that a marriage between a man and a woman is an Ordinance of *Tian*. Any disagreement or any difference in class, nation, culture, ethnic, social, politic or religion shall not be impediments to marriages. *Li Yuan* (Confucianism's matrimonial ceremony) cannot be done upon any solemnization of interfaith mixed marriage, but Confucianism can give a blessing as an acknowledgement and notification of interfaith mixed marriage.

family through a valid marriage is one of the constitutional rights.[420] By noting the statements above, it appears that the opinion of religions to (totally) prohibit an interfaith mixed marriage should be re-considered and updated.

The author supports the concurring opinion of Judge Maria Farida Indriati on the ground for refusal. The author agrees with the argument of other judges, but the author withdraws another conclusion. In the proceeding, it appears that some religions in Indonesia allow an interfaith mixed marriage. Bearing in mind the arguments of the respectable Judges stated in the case of Ms. Sumarni and Mr. Medellu and Andy Vony Gany, that MA 1974 does not regulate an interfaith mixed marriage, pluralism in the Indonesian society, in addition to the option to marry and to profess a religion, constitute a person's free will and the state should not interfere such personal area; the State should reasonably response to such situation. The State shall provide regulations to a couple who choose such non-advisable and non-ideal marriage.

It is advisable that the Government provide regulations on the solemnization of interfaith mixed marriage. The Government could simplify the process to obtain a district court decision.

6 Current Indonesian PIL

This part will describe about Indonesian PIL because an international mixed marriage has a close connection with PIL. If Indonesia would like to enter into an open society with ASEAN, the preparation for its PIL laws and regulations will be important. The objective of this description is to provide an understanding of the current situation of Indonesian PIL, regulations and opinion of its scholars. It shall consist of PIL principles stated in *Algemene Bepalingen van Wetgeving voor Nederlands Indië* (General Legislative Provisions for the Dutch East Indies, herein referred to as the "**AB**") as PIL general principles and its development, as well as the Bill of Indonesian PIL of 1997 as the general opinion of Indonesian scholars.

6.1 PIL's Three Skeleton Keys: Art. 16, 17, and 18 of AB

The principles of Indonesian PIL are contained in Art. 16, 17, and 18 of *Algemene Bepalingen van Wetgeving voor Nederlands Indië* (General Legislative Provisions for the Dutch East Indies), State Gazette 1847 No. 23.

Art. 16 of AB on the applicable law of personal status states that, *"De wettelijke bepalingen betreffende den staat en de bevoegdheid der personen blijven verbindend*

[420] Art. 28B (1) of the Indonesian Constitution. Translation: "Every person shall be entitled to establish a family and continue descendants by a valid marriage."

voor ingezetenen van Nederlands-Indië, wanneer zij zich buiten's lands bevinden." Translation: Legal provisions on status and personal authority shall remain binding for residents of the Dutch East-Indiës whenever they are abroad.

Art. 17 of AB on the applicable law of goods or *lex rei sitae* states that, "*Ten opzigte van onroerende goederen geldt de wet van het land of plaats, alwaar die goederen gelegen zijn.*" Translation: Real properties shall be subject to the laws of the country where the property is located.

Art. 18 of AB on the applicable law of legal form or *lex loci actus* stated that, *"1. De vorm van elke handeling wordt beoordeeld naar de wetten van het land of de plaats, alwaar die handeling is verricht. 2. Bij de toepassing van dit en van het voorgaande artikel moet steeds worden acht gegeven op het verschil, hetwelk de wetgeving daarstelt tussen Europeanen en Inlanders."* Translation: 1. The form of every transaction shall be determined by the laws of the country or the place where the transaction takes place. 2. With the application of the current as well as the previous article, consideration should be given to differences between Europeans and natives as provided in the legislation.

These PIL articles remain effective in Indonesia based on Art. 1 of the Transitional Provision of the 1945 Indonesian Constitution.[421]

6.2 Development of PIL's Three Skeleton Keys

After more than a century, laws and regulations in Indonesia have developed.[422] The development of PIL also occurs in district court decisions in relation to PIL cases, known as the landmark jurisprudences. Thus, PIL's skeleton keys as the PIL basic principal still apply, but they cannot be seen as it is without any change or adjustment to regulations and or landmark decisions, as can be collected below.

6.2.1 Art. 16 of AB: Personal Status

Art. 16 of AB states that the prevailing laws and regulations in Indonesia concerning personal authority or rights and titles of a person shall remain valid and effective for Indonesian citizens wherever they go. Therefore, the law applicable to Indonesian

[421] Art. 1 of the Transitional Provision of the 1945 Indonesian Constitution. All of the existing laws and regulations shall remain effective insofar as a new Law has not been introduced according to this Constitution. (*Segala peraturan perundang-undangan yang ada masih tetap berlaku selama belum diadakan yang baru menurut Undang-Undang Dasar ini*). This Art. 1 was originally Art. II of the Transitory Provisions of the (original) Indonesian Constitution; after the fourth amendment was made at the beginning of the twentieth century, it became Art. 1 as we know it today.

[422] Tiurma M.P. Allagan, *Indonesian Private International Law: The Development After More Than A Century,* in *Indonesian Journal of International Law* (2017), Vol. 14 No. 3, (Jakarta: Lembaga Pengkajian Hukum Internasional, 2017), pp. 381-416.

citizens in relation with their capacity and competence is the Indonesian law. It still binds them wherever they go, and has extraterritorial title.

This provision is interpreted in the same manner by any foreigners who are in the territory of Indonesia. Law of the state in which they become a citizen will be the law applicable to them in determining their capacity and authority. It is clear that Indonesia is implementing the Principle of Nationality, instead of Principle of Domicile.

The situation in Indonesia has developed. More foreigners live in Indonesia, and vice versa, more Indonesian citizens live abroad. Indonesian regulations allow Indonesian citizens to have a limited dual nationality, as well as allow foreigners to have a permanent domicile in Indonesia. Indonesian scholars also indicate or suggest another application of the Principle of Nationality, as will be described below. Bearing these in mind, the Principle of Nationality in determining the applicable law of a person needs re-consideration.

6.2.1.1 Principle Nationality in Prevailing Regulations

After the independence of Indonesia, there are several nationality laws applied in Indonesia.[423] All of them still adopt the principle of *ius sanguinis* in determining the persons who have Indonesian nationality. The current Nationality Law allows children from a mixed marriage to have a (limited) dual nationality.

Initially, Indonesia adopted the Principle of *Ius sanguinis* through Law No. 3 of 1946. At that time, the nationality law also included entities.[424] Further, Law No. 3 of 1946 was replaced by Law No. 62 of 1958.[425] This law determined that Indonesian citizens

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[423] Three laws regarding Indonesian Nationality which used to be applied in Indonesia are: (1) Law No. 3 of 1946 regarding Citizens and Population, as amended by Law No. 6 of 1947 regarding the Amendment to Law No. 3 of 1946 regarding Citizens and Population, amended by Law No. 8 of 1947 regarding Extending Time for the Submission of Statement on Relation with Indonesian Nationality and Law No. 11 of 1948 regarding Re-extending Time for the Submission of Statement on Relation with Indonesian Nationality; (2) Law No. 62 of 1958 regarding Nationality as amended by No. 3 of 1976 regarding the amendment to Article 18 of Law No. 62 of 1958; and (3) Law No. 12 of 2006 regarding Nationality of the Republic of Indonesia.

[424] It is worth to note that it has a provision regarding entity while it is not mentioned in the next nationality laws. It mentions that "*Warga Negara Indonesia ialah: … Badan hukum yang didirikan menurut hukum yang berlaku dalam Negara Indonesia dan bertempat kedudukan di dalam daerah Indonesia.*" This provision was added in the first amendment, Law No. 6 of 1947, which states that Indonesian citizens include entities established according to the prevailing laws in the territory of RI and having its domiciled or legal seat within the territory of RI.

[425] Indonesia, *Undang-undang tentang Kewarganegaraan Republik Indonesia (Law regarding Nationality of the Republic of Indonesia),* UU No. 62 Tahun 1958, LN No. 113 Tahun 1958, (Law No. 62 of 1958, SG No. 113 Year 1958; as amended by *Undang-undang tentang Perubahan Pasal 18 Undang-Undang No. 62 Tahun 1958 Tentang Kewarganegaraan Republik Indonesia (Law regarding the Amendment to Article 18 of Law No. 62 of 1958 regarding Nationality of the Republic of Indonesia),* UU No. 18 Tahun 1976, LN No. 20 Tahun 1976 (Law No. 18 of 1976, SG No. 20 Year 1976).

were, among others, persons who were determined by agreements or laws as of August 17, 1945 as Indonesian citizens, children whose father is an Indonesian citizen, or mother is Indonesian citizen while the whereabouts of their father was not known, including adopted children whose parents are Indonesian citizens.[426] Those regulations reflected the concept of *ius sanguinis*, instead of *ius soli*.

Law No. 62 of 1958 adopted the principle of one law for one family. A foreign wife can become an Indonesian citizen.[427] Law No. 62 of 1958 stipulates that one person can only have one nationality at once, including children. This law gives easiness in identifying the applicable law of a person, whereby the applicable law must be his/her national law. However, the easiness is not suitable for children born from an international mixed marriage family. This problem is one of the backgrounds of promulgation of Law No. 12 of 2006 regarding Nationality of the Republic of Indonesia, which will be described below.

Law No. 12 of 2006 regarding Nationality of the Republic of Indonesia[428], hereinafter referred to as "**Law No. 12 of 2006**" was issued to protect children of an international mixed marriage and serve as adjustment due to the ratification of CEDAW by Indonesia.[429] Law No. 12 of 2006 accommodates a slight change in the Principle of Nationality. Previously, Indonesia requires one person to only have one nationality at once while Indonesian nationality can only be obtained from an Indonesian father. An Indonesian mother can give her nationality to her children when the children do not have any nationality from their father or in certain circumstances.[430] Those provisions resulted in some children born as foreign citizens in Indonesia. In the event of divorce, children

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[426] Art. 1 of Law No. 62 of 1958.

[427] Art. 9 of Law No. 62 of 1958. *"(1) Kewarganegaraan Republik Indonesia yang diperoleh oleh seorang suami dengan sendirinya berlaku terhadap istrinya, kecuali apabila setelah memperoleh kewarganegaraan Republik Indonesia, istri itu masih mempunyai kewarganegaraan lain. (2) Kehilangan kewarganegaraan Republik Indonesia oleh seorang suami dengan sendirinya berlaku terhadap istrinya, kecuali apabila istri itu menjadi tanpa kewarganegaraan."*

[428] Indonesia, *Undang-undang tentang Kewarganegaraan Republik Indonesia (Law regarding Nationality of the Republic of Indonesia),* UU No. 12 Tahun 2006, LN No. 63 Tahun 2006, (Law No. 12 of 2006, SG No. 63 Year 2006.

[429] CEDAW is the United Nations' Convention on the Elimination of All Forms of Discrimination Against Women, ratified by Indonesia based on the *Undang-Undang tentang Penghapusan Segala Bentuk Diskriminasi Terhadap Wanita (Law regarding Ratification of Convention on the Elimination of All Forms of Discrimination Against Women),* Undang-undang No. 7 Tahun 1984, LN No. 84 Tahun 1984 (Law No. 7 of 1984, SG No. 84 of 1984).

[430] Art. 1 of Law No. 62 of 1958, Art. 1 *"Warga negara Indonesia adalah: … (e) orang yang pada waktu lahirnya ibunya warga negara Indonesia, jika ayahnya tidak mempunyai kewarganegaraan, atau tidak diketahui kewarganegaraan ayahnya."*

who are foreigners can be deported from Indonesia and separated from their beloved mother.[431]

Law No. 12 of 2006 was issued to overcome those problems. Indonesia still adopts the Principle of *ius sanguinis*, but now it allows a limited dual nationality, instead of one absolute nationality. Children from an international mixed marriage can have a dual nationality but it is limited until they are eighteen years old. Within three years as of their birthday or the date of their marriage, they must choose one nationality.[432] The age of eighteen is in accordance with another maturity limitation applicable in Indonesia.[433] With a dual nationality, children of international mixed marriage will not face a threat of separation from the family by deportation.

In relation to the applicable law of dual nationality, Indonesian PIL writings concluded that the applicable law to determine his/her personal status shall be the real and effective nationality.[434] The real and effective nationality is the point of contact which covers the entire daily life of the relevant child, social facts i.e. residence, center of interest, family relationship, participation of social and state life, bound or attached feeling to a particular country.[435]

In this case, it is advisable to observe the tendency of modern trends. There are some situations which make Indonesia needs to re-defines an effective and active nationality. For instance, equality of a husband and wife in a family which sets aside the use of

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[431] For further explanation, see Zulfa Djoko Basuki, *Dampak Perkawinan Campuran terhadap Perwalian Anak (Child Custody)* (Jakarta: Yarsif Watampone, 2005).

[432] Art. 6 of Law No. 12 of 2006, Art. 6.

[433] Zulfa Djoko Basuki, *Bunga Rampai Kewarganegaraan, Dalam Persoalan Perkawinan Campuran* [translation by the author: Anthology of Nationality, in the Issue of Mixed Marriage], (Jakarta: Badan Penerbit FHUI, 2007), p. 19. See also Indonesia, *Undang-undang tentang Perkawinan (Law regarding Marriage),* Undang-undang No. 1 Tahun 1974, LN No. 1 Tahun 1974 (Law No. 1 of 1974, SG No. 1 of 1974), Art. 47. *Undang-undang tentang Perlindungan Anak (Law regarding Child Protection)*, Undang-undang No. 23 Tahun 2002, LN No. 109 Tahun 2002 (Law No. 23 of 2002, SG No. 109 of 2002) as amended to date, Art. 1.

[434] Sudargo Gautama, *Hukum Perdata International Indonesia,* (Bandung: Penerbit PT. Eresco, 1986), pp. 246-255. Sudargo Gautama describes ten solutions or ways to determine the applicable law in case of dual nationality. They are (1) replacing all indications of nationality and replacing it with domicile of the respective person; (2) using the effective or active nationality; (3) using the judge's law (lex fori); (4) using all nationality laws and apply them all accumulatively; (5) nationality law which is the most suitable with the judge's law (lex fori); (6) using the first acquired nationality; (7) using the later acquired nationality; (8) using the nationality which is at the same time similar to the domicile of the respective person; (9) using the law chosen by the respective person; and (10) using the nationality which gives more benefit to the respective person. Sudargo Gautama himself supports the second way to settle a dual nationality case, namely using the effective or active nationality.

[435] *Ibid,* p. 246-248. See also S. Gautama, *Hukum Perdata Internasional Indonesia*, Jilid II Bagian III, buku Ke-empat (Bandung: Alumni, 1989), p. 274. See also Zulfa Djoko Basuki, *Dampak Perkawinan Campuran terhadap Perwalian Anak (Child Custody),* pp. 221, 258, whereby she quotes Leenard Palsson, *Marriage and Divorce in Comparative Conflict of Laws* (Leiden, A.W. Sijthoff, 1974), p. 84.

nationality of the male (as a father or a husband) as the first priority, tendency of integration of society which rises the freedom to move from one state to another state, and tendency to give citizen a choice in terms of personal status, and tendency new rule-exception relationship whereby nationality becomes an alternative to determine the applicable law.[436] Based on these, it is advisable if Indonesia can stipulate that nationality shall determine the applicable law. In particular cases, such as a dual or multi-nationality or stateless person, nationality will be assisted by Habitual Residence. In short, the Principle of Nationality is assisted by Habitual Residence in determining the applicable law.

There are district court decisions as well as regulations of Indonesia which show the application of other principles, other than the Principle of Nationality, in determining the applicable law. They indicate that Indonesia is aware and gives its attention to PIL development nowadays. Those regulations and district court decisions will be described below.

6.2.1.2 Matrimonial Domicile in Divorce Cases

In divorce cases, Indonesian judges apply the Indonesian Law as the applicable law (*lex fori*). One of the cases involved a couple, a Dutch citizen and South African citizen, both living in Indonesia. In the district court decision, the judge mentioned several legal facts including the fact that the parties/petitioner had their matrimonial domicile in Indonesia leading the judge to apply the Indonesian law.[437] This case shows that the judge has done a legal interpretation (*pelembutan*) from the Principle of Nationality to the Principle of Domicile, particularly the Matrimonial Domicile of the respective spouse.

6.2.1.3 Habitual residence in Adoption

The requirements of foster children and foster parents in Indonesia consist of two parts, substantive requirements and administrative requirements. Substantive requirements are mentioned in Government Regulation No. 54 of 2007 (hereinafter referred to as "**GR**

[436] Heinz-Peter Mansel, *Nationality*, in *Encyclopedia of Private International Law*, (ed.) Jürgen Basedow, Giesel Rühl, Franco Ferrari, Pedro De Miguel Asensio, (Cheltenham: Edward Elgar Publishing Limited, 2017), pp. 1296-1301.

[437] Decision of Central Jakarta District Court, "Decision No. 435/Pdt/G/2003/PN.Jkt.Pst dated July 7, 2004", pp. 10-11. The petitioner is a Netherlands citizen and the defendant is a South African citizen. Both of them have their marital domicile in Jakarta due to the occupation of the petitioner. Before Jakarta, their domicile was Cape Town, South Africa where they had officially concluded their marriage. The petitioner claimed a divorce from her husband due to continuous un-resolved disputes and finally his absence from home for a certain period. The first argument is one of the reasons for divorce stipulated in MA 1974. The judge applied the RI laws due to the domicile of the plaintiff and defendant, and further granted the petition of petitioner.

No. 54 of 2007"), while administrative requirements are detailed in Regulation of the Minister of Social Affairs No. 110 of 2009.[438]

Prospective foreign foster parents can perform adoption if they meet all requirements as stipulated in the prevailing Indonesian laws and regulations,[439] among others, they must have an approval of their original state through its embassy or representative office in Indonesia and also the approval of the Minister of Social Affairs of Indonesia.[440] In addition, prospective foreign foster parents must have a valid legal domicile in Indonesia for at least two years. They must sign a statement that they will give a report in writing on the development of the foster child at least once a year. If they move abroad the report can be made through an Indonesian Embassy or its representative office in their country until the child is eighteen years old.[441]

Foreign foster parents must have the approval of their original country through its representative office in Indonesia, which reflects the Principle of Nationality. It means that the requirements from their original country for adoption are applicable to them. In addition, foreign foster parents need to fulfill the requirements of Indonesian law. They have to establish their domicile in Indonesia by staying legally in Indonesia for at least two years. It means that the Indonesian regulations are applicable to foreign foster parents. Hence, both requirements for adoption of their original country and Indonesian law are cumulatively applicable to foreign foster parents.

6.2.1.4 Central of gravity of child in the future in Adoption

There was an interesting case in 1989 with respect to an adoption of a foreign foster child by foreign foster parents in Galang Island, Indonesia. This case started when a Canadian couple, who stayed in Galang Island, submitted a request to adopt a Vietnamese girl before the Tanjung Pinang district court.[442]

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[438] Indonesia, *Peraturan Pemerintah tentang Prosedur Pengangkatan Anak (Government Regulation regarding the Procedure for Child Adoption),* Peraturan Pemerintah No. 54 Tahun 2007, LN No. 123 Tahun 2007 (Government Regulation No. 54 of 2007, SG No. 123 of 2007). *Peraturan Menteri Sosial tentang Persyaratan Pengangkatan Anak (Regulation of the Minister of Social Affairs regarding the Requirements for Child Adoption),* Peraturan Menteri Sosial No. 110/HUK/2009.

[439] Art. 13 of GR No. 54 of 2007.

[440] Art. 14 (a) of GR No. 54 of 2007.

[441] Art. 17 and Art. 40 of GR No. 54 of 2007.

[442] Tanjung Pinang District Court. "Decision No. 205/Pdt.P./P/N/FPAT dated May 20, 1989." Galang Island (Indonesia) is located to the south of Batam Island. It is one of the designated places for refugees from Vietnam who came between 1979-1996, referred to as *"Manusia Sampan"*. UNHCR built camps and facilities to help those refugees which were then closed in 1997.

The foster child was a Vietnamese girl who was twelve years old. Her father was one of the refugees in Galang Island and her mother committed suicide after suffering from a mental illness. The foster parents were Canadian Citizens who have stayed in the same island for a year and 8 months as volunteers of the United Nations. They submitted a request to adopt this Vietnamese girl before the Tanjung Pinang District Court as the authorized district court where both parties had their habitual domicile.

The judge stated that this case was a PIL case. Therefore, the judge considered and referred to the provisions of The Hague Convention of 1965 (Convention of Jurisdiction, Applicable Law & Recognition Decrees relating to the adoptions, 1965), although Indonesia was not a contracting state to such convention. The judge considered the provisions of the convention as the case involved foreign parties, both parents and child. The judge mentioned that he had valid legal jurisdiction since both parties had their habitual residence in his jurisdiction, in line with the provisions stated in Art. 3 (a) of such Convention.[443]

The next consideration was about the applicable law. The judge mentioned that Indonesia's law was not the applicable law since both parties were foreigners and they have not been in Indonesia for two years yet. The judge then considered that the foster child would be taken to Canada by the foster parents; therefore, the center of gravity of the child would be Canada. Then the judge stated that the law of Canada was the applicable law for the case for the best interest of the child.[444] After considering the requirements of Canadian law which were advised by the Canadian Government, and also the Vietnam Law, the request for adoption from the Canadian couple was granted according to the Canadian Law.

The case shows that the Principle of Nationality was not applied rigidly, the judge considered the best interest of the child and the law of country where the child would have his/her central gravity and interest as well as his/her habitual residence in the future became the applicable law.

6.2.1.5 Request for Dual Nationality

Nowadays, Indonesian Diaspora Networking urges the government of Indonesia to allow dual nationality for Indonesian people living abroad. They want to possess

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[443] *Convention of Jurisdiction, Applicable Law & Recognition Decrees relating to the Adoptions*, 1965. Art. 3(a) *"Jurisdiction to grant an adoption is vested in one of the authorities of the state, where the adopter habitually resides or, in the case an adoption by spouses, the authorities of the state in which both habitually reside."*

[444] The judge clearly set aside the requirements of Indonesian Law for intercountry Adoption at that time, whereby the foster child is at the maximum of 5 years old. It shows that Canadian Law is applied and considered in this case.

Indonesian nationality to keep their connection with Indonesia, and at the same time also possess the nationality of the state where they live. They requested Indonesia to allow for a person to have dual nationality with no age limitation.[445]

In relation to PIL, the important thing is to determine what is the law applicable to the respective person when he/she has more than one nationality. Indonesian PIL scholars agree that the most connected law as reflected by the effective and active nationality of the person shall be the applicable law.[446] Therefore, if the judge has to decide cases of dual nationality, it is wise to consider the factual domicile, their real intention to live in order to determine the real connection of the person. The request is under discussion. If this request is approved, application of the Principle of Nationality indeed needs to be modified. This issue will be further discussed and elaborated in Sub-chapter 7 in relation to the Bill of Indonesian PIL issued in 1997.

6.2.1.6 Immigration Law and Indonesian PIL scholars' opinion

According to the Immigration Law,[447] foreigners can stay in Indonesia by holding a Permanent Stay License (*Izin Tinggal Tetap*) for five years and can be extended for an unlimited period as long as there is no cancellation of such license. Foreigners who hold a Permanent Stay License shall be considered as inhabitants in the territory of Indonesia.

No current regulation in relation to the applicable law of those foreigners, thus the analogy of Art. 16 of AB is applied in this situation. Sudargo Gautama and Zulfa Djoko Basuki mentioned that the Indonesian law should be the law applicable to those foreigners who have their permanent domicile in Indonesia.[448]

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[445] Ahmad Jazuli, *Diaspora Indonesia dan Dwi Kewarganegaraan Dalam Perspektif Undang-undang Kewarganegaraan Republik Indonesia (Indonesian Diaspora and Dual Nationality in the Perspective of the Nationality Law of the Republic of Indonesia),* JIKH Vol. 11 No. 1 March 2017, available at http://ejournal.balitbangham.go.id/index.php/kebijakan/article/download/215/pdf , last accessed on March 30, 2018.

[446] Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia,* (Bandung: Binacipta, 1987), pp. 87-88. See also Zulfa Djoko Basuki, *Bunga Rampai Kewarganegaraan Dalam Persoalan Perkawinan Campuran*, pp. 102-105.

[447] Indonesia, *Undang-undang tentang Imigrasi (Law regarding Immigration),* Undang-undang No. 6 Tahun 2011, State Gazette No. 52 of 2011 (Law No. 6 of 2011, SG No. 52 of 2011); and *Peraturan Pemerintah tentang Peraturan Pelaksanaan Undang-undang No. 6 Tahun 2011 tentang Imigrasi* (Government Regulation regarding the Implementing Regulation of Law No. 6 of 2011 regarding Immigration), Government Regulation No. 31 of 2013, State Gazette No. 5409 of 2013, as amended to date.

[448] Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia, Op.Cit.*, pp. 87-88. See also Zulfa Djoko Basuki, *Bunga Rampai Kewarganegaraan Dalam Persoalan Perkawinan Campuran*, *Op.Cit.,* pp. 102-105.

The opinion above has, at least two backgrounds; first, residency of the respective person and, second, the protection for the society surrounding the respective person. It will be a little strange if the nationality law of the respective person still applies while he/she has his domicile or residency in Indonesia for a certain long period. Therefore, foreigners who hold a Permanent Stay License and effectively live in the Indonesian territory should be subject to the Indonesian law.

6.2.1.7 Foreigners eligible to hold a property for residency

Based on Law No. 5 of 1960 regarding the Basic Agrarian Law, hereinafter referred to as the "**Basic Agrarian Law**", only Indonesian citizens are allowed to hold a Right to Own (*Hak Milik*) and Right to Build (*Hak Guna Bangunan*) upon a plot of land. Foreigners are allowed to own a property in Indonesia based on particular restrictions. The implementing regulations of those restrictions are described in Government Regulation No. 103 of 2015 regarding Ownership of Residential House or Settlement by Foreigners Domiciled in Indonesia ("**GR No. 103 of 2015**").[449]

It states that foreigners are eligible to own a residential unit if their presence are beneficial, or they are doing business, are working or making (direct) investment in the territory of Indonesia.[450] In terms of license, it means that foreigners hold a Stay Permit License according to the prevailing regulations.[451] Foreigner can own and enjoy properties according to the Basic Agrarian Law. In this situation, the Basic Agrarian Law employs the factual facts or residency of foreigners to determine whether or not they are entitle to own a plot of land in Indonesia.[452]

6.2.1.8 Renvoi

Renvoi occurs, inter alia, when the Principle of Nationality meets the Principle of Domicile. Indonesia acknowledges *renvoi* or remission and transmission (*penunjukkan lebih jauh*), as reflected in cases settled before Indonesian district courts. The landmark decisions were the case of "*Palisemen of British India*" issued by the court of Medan in

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[449] Indonesia, *Peraturan Pemerintah tentang Pemilikan Rumah Tempat Tinggal atau Hunian oleh Orang Asing yang berkedudukan di Indonesia (Government Regulation regarding Ownership of Residence House or Residence Unit by a Foreigner domiciled within Indonesia*), Peraturan Pemerintah No. 103 Tahun 2015, LN No. 325 Tahun 2015 (Government Regulation No. 103 of 2015, SG No. 325 of 2015).

[450] Art. 1 (1) of GR No. 103 of 2015.

[451] Art. 2 (2) of GR No. 103 of 2015.

[452] Tiurma M.P. Allagan, *The Facilities to the Foreigners in the Perspective of Indonesian Private International Law* in *Indonesian Legal Review* in forthcoming 2018 edition.

1925,[453] and the case of *Armenian Nasrani* issued by the *Presiden Raad van Justitie* of Semarang in 1928.[454] From both cases, the respective judges did not mention any word about "*renvoi*", but it can be concluded when the judges referred to the nationality law of the involved person, and then the foreign law referred back to the Indonesian law. The judges applied *renvoi* in settling these cases.

Upon these circumstances, Sudargo Gautama is of the opinion that the acceptance of *renvoi* resulting in the application of national law of the respective judges (*in casu*, the Indonesian law) is right and wise. He mentioned that in this form, *renvoi* can be referred to as *pelembutan hukum* or *rechtsverfijning*.[455] The acceptance of *renvoi* leads to the application of the internal law after the judge give a chance to the foreign law to apply. Therefore, it is not from the spirit of *chauvinis juridicsh*, but from a wise and supportive thought.[456] The author supports the opinion above which is necessary at that time. However, it is also wise if Indonesia gives its attention to the principle of Habitual Residence in the next Bill of Indonesian PIL to reflects the most connected law to the person. In relation to this, discussion will be presented in Sub-chapter 7.

6.2.1.9 Public Policy as a limitation of Personal Status

Public policy is one of the timeless topics in PIL. This topic, together with nationality and choice of law, are the three pillars of PIL in classic writings of PIL.[457] Public policy

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[453] At that time, this case was definitely interesting due to the judge's opinion which was contradictory to the opinion of judges in the NL. This case started by a petition submitted by a British Indian who had his domicile in RI. He petitioned to be declared bankrupt. The judge understood that this petition was from the group of *Timur Asing* who had his domicile in RI. He predicted that the petitioner was 17-18 years old when he submitted the petition. The legal issue was whether he could be declared bankrupt according to the law of RI at that time. The judge stated that RI used the Principle of Nationality meaning that the judge appointed the law of British India, while PIL of British India applied the Principle of Domicile for personal status. Subsequently, the judge applied Burgerlijk Wetboek as the prevailing law of country where a subject has his domicile. Therefore, the petition of the British Indian subject was approved. See furthermore the case in Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia, Op.Cit.,* pp. 101-106.

[454] *Ibid.* In this court decision, the judge stated that a Christian Armenian who went abroad and left his country, by taking nothing as his personal status must obey the law of country where he had his new domicile. Therefore, the judge applied the law enforced in Indische as the new domicile of the respective Christian Armenian namely BW.

[455] Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia*, *Op.Cit.,* pp. 101.

[456] *Ibid.*, p. 117.

[457] Sudargo Gautama, *Hukum Perdata Internasional Indonesia, Jilid II bagian 3, Buku ke-empat,* [translation by the author: Indonesian Private International Law, Volume II part 3, the fourth book] (Bandung: Alumni, 1989), p. 3. Sudargo Gautama quotes Mancini who mentions that Public Policy together with the Principle of Nationality and Choice of Law (*partaij autonomie*) are the three pillars (*drei saulen*) of PIL.

is mentioned as the most important discussion in PIL although it also becomes the darkest topic compared to other topics in PIL.[458]

Sudargo Gautama mentions that public policy allows judges to apply their own law and set aside the choice of law determined according to PIL, because its application will violate public interest and good moral (*kesusilaan baik*) of the community. A foreign law which pierces the sense of justice, fundamental legal system and moral of the respective society can be ruled out by public policy.[459] The application of foreign law must be a manifest incompatible with the principles of national law of the respective judges. The requirement of "manifest incompatible" is mandatory. Public policy cannot be applied to waive an application of a foreign law on the ground that such institution is not recognized in the law of their hands (*lex fori*).[460]

Public policy is also applied in personal status cases. The applicable law which is appointed by the nationality of a foreigner could be set aside. In Indonesia, slavery or civil death, mutual consent as the ground of divorce and same sex marriage are considered to be manifest incompatible with the Indonesian law. Therefore, such foreign law regarding the same shall be waived by means of public policy.[461]

6.2.2 Art. 17 of AB: *Lex re Sitae*

This principle is applied in Indonesian PIL and it is different from Inter Law or *Hukum Antar Golongan*. The Interlegal Law employs the principle of *mobilia sequntuur personam* for movable goods. It means the law applicable to movable goods shall follow the applicable law of the owner or person who occupies the same. Upon a plot of land, both PIL and Interlegal Law stipulate that the applicable law shall be the local law of country where the respective land or property is located.

The principle of *lex re sitae* still applies in Indonesian PIL. Upon land, registered goods for instance aircrafts, ships or vessels, intellectual property rights, the Indonesian law is the applicable law. In relation to this principle, the author cannot find any alteration or amendment.

Upon land within the territory of Indonesia, the Basic Agrarian Law is applied. It stipulates that only Indonesian citizens are allowed to hold the Right to Own (*Hak Milik*)

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[458] *Ibid.*

[459] Sudargo Gautama, *Hukum Perdata Internasional Indonesia, Jilid II bagian 3, Buku ke-empat, Op.Cit.,* p. 9.

[460] *Ibid*, p. 42.

[461] Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia*, *Op.Cit.,* pp. 137-140.

and Right to Build (*Hak Guna Bangunan*) upon a plot of land. Foreigners are allowed to own a property in Indonesia based on particular restrictions.[462]

Law No. 1 of 2009 regarding Aviation, hereinafter referred to as the "**Aviation Law**",[463] states that it is applied to all activities of aircrafts and foreign aircrafts which have activities from or to the territory of Indonesia, and also Indonesian aircrafts abroad.[464] Indonesian Aircrafts are aircrafts which have Indonesian registration signs and Indonesian nationality signs.[465] In this case, nationality signs and activities to, within or from Indonesia are the indication that the Aviation Law is applied to the respective aircrafts.

The same provisions are applied to vessels as described in Law No. 17 of 2008 regarding Shipping, hereinafter referred to the "**Shipping Law**".[466] The Shipping Law regulates that it is applied to all foreign ships which are sailing within the waters of Indonesia and all Indonesian-flagged ships abroad.[467] This law applies extraordinarily to Indonesian-flagged ships. The provisions are the same as the provisions on Indonesian-flagged aircrafts.

Intellectual Property Rights, namely trade secret, industrial design, integrated circuit design, patent, trademark, are stipulated separately each in particular laws and regulations.[468] Those laws are applied to intellectual properties registered in Indonesia. Intellectual property right, for instance a patent right, is an intangible asset arising on the date of certificate which is effective retroactively as of the acceptance date of the

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[462] Indonesia, *Peraturan Pemerintah tentang Pemilikan Rumah Tempat Tinggal atau Hunian oleh Orang Asing yang berkedudukan di Indonesia (Government Regulation regarding Ownership of Residential House or Settlement by Foreigners Domiciled in Indonesia*), Peraturan Pemerintah No. 103 Tahun 2015, LN No. 325 Tahun 2015 (Government Regulation No. 103 of 2015, State Gazette No. 325 of 2015).

[463] Indonesia, *Undang-undang tentang Penerbangan (Law regarding Aviation)*, Undang-undang No. 1 Tahun 2009, LN No. 1 Tahun 2009 (Law No. 1 of 2001, SG No. 1 of 2001).

[464] *Ibid.,* Art. 4.

[465] *Ibid.,* Art 1 point (6).

[466] Indonesia, *Undang-undang tentang Pelayaran (Law regarding Shipping)*, Undang-undang No. 17 Tahun 2008, LN No. 64 Tahun 2008 (Law No. 17 of 2008, State Gazette No. 64 of 2008).

[467] *Ibid.,* Art. 4 (b), (c).

[468] Respectively, those Intellectual Property Rights in Indonesia are stipulated in (1) Law No. 30 of 2000 regarding Trade Secret, State Gazette No. 242 of 2000; (2) Law No. 31 of 2000 regarding Industrial Design, State Gazette No. 243 of 2000; (3) Law No. 32 of 2000 regarding Integrated Circuit Design, State Gazette No. 244 of 2000; (4) Law No. 13 of 2016 regarding Patent, State Gazette No. 176 of 2016; (5) Law No. 20 of 2016 regarding Trademark and Geographical Indication, State Gazette No. 252 of 2016.

respective application.[469] Those rights can be assigned based on inheritance, grant, intestate or will, agreement in writing or any other causes permitted by the prevailing laws. The underlying agreement of assignment(s) must be complied and permitted by the Indonesian law.[470] The provision is also similar on the right of trademark. Such assignment must be registered in the General Registration Book of the respective Directorate General; otherwise it has no legal impact to any third parties.

In relation to encumbrance on those rights, it can be charged by fiduciary securities according to the Fiduciary Securities Law.[471]

The Copyright Law states that it is applied to: (a) the creation of Indonesian citizens or entities or inhabitants, and (b) the creation of Non-Indonesian citizens or entities provided that the first announcement of the creation is made in Indonesia, and (c) the creation of Non-Indonesian citizens or entities the state of which has a bilateral or multilateral agreement with Indonesia.[472] The Copyright Law stipulates that a copyright is movable and intangible goods and can be charged by fiduciary encumbrance.[473]

These provisions show that the applicable law to these Intellectual Property Rights are the law of country where they are registered or, in case of copyright, the first announcement with the exception to an international convention to which Indonesia is a contracting state.

6.2.3 Art 18 of AB: *Locus rigit actum*

The principle of *locus rigit actum* determines that the form of legal action shall be valid if it is according to the local law of country where the legal action takes place, save for the execution of immovable goods which uses the principle of *lex re sitae*.[474] This principle remains within the prevailing laws and regulations of RI, among others, in the provisions of marriage and drawing up of legal documents, for instance, a will or a power of attorney.

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[469] Art. 59, 60 of Law No. 13 of 2016 regarding Patent, State Gazette No. 176 of 2016.

[470] Art. 74 of Law No. 13 of 2016 regarding Patent, State Gazette No. 176 of 2016.

[471] Art. 108 of Law No. 13 of 2016 regarding Patent, State Gazette No. 176 of 2016, *jo*. Law No. 42 of 1999 regarding Fiduciary Securities, State Gazette No. 168 of 1999.

[472] Indonesia, *Undang-undang tentang Hak Cipta (Law regarding Copyright)*, Undang-undang No. 28 Tahun 2014, LN No. 266 Tahun 2014 (Law No. 28 of 2014, SG No. 266 of 2014), Art. 2.

[473] Art. 16 (1), (3) of Law No. 28 of 2014.

[474] Art. 9 of the Academic Draft of 2015.

In respect of marriages, this principle is recognized in MA 1974. MA 1974 stipulates that a marriage solemnized abroad shall be valid if it is solemnized according the local law of country where the marriage is solemnized, provided that such marriages does not contradict MA 1974.[475] Within a year after their return to Indonesia, their marriage must be registered with a Marriage Registration Office in Indonesia.[476]

The same principle is applied to marriages between an Indonesian citizen and foreign citizen which are solemnized in Indonesia. Such marriages shall be valid if the solemnization is held according to MA 1974.[477] The same principle is applied to the marriage of Indonesian citizens held abroad in a Representative Office of Indonesia in the relevant state. This regulation uses the extraterritorial jurisdiction of the Representative Office of Indonesia, therefore such marriages can be considered solemnized within the territory of Indonesia. These regulations are embodied in the Joint Ministerial Decision of the Minister of Religious Affairs and Minister of Foreign Affairs No. 589 of 1999 and No. 182/OT/99/01[478]

In respect of adoption, this principle can be found in Government Regulation No. 54 of 2007 regarding Adoption, hereinafter referred to as the "**GR 2007**". Intercountry adoption in Indonesia has two variations: (i) an Indonesian child who is adopted by foreign foster parent(s) and (ii) a foreign child adopted in Indonesia by Indonesian foster parent(s).[479] Intercountry adoption can be deemed as a legal action which is taken to move away or to shift a child from the authority of her biological parent, legal guardian, or any other party who has responsibility to take care, educate and raise the child, into a foster family whereby both party (in the territory of Indonesia) have different nationality and one of them is an Indonesian citizen.[480] Intercountry adoption in Indonesia must be

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[475] Art. 56 of MA 1974.

[476] *Ibid*.. See also, Indonesia, *Peraturan Menteri Agama tentang Pendaftaran Surat Bukti Perkawinan Warga Negara Indonesia Yang Dilangsungkan di Luar Negeri (Regulation of the Minister of Religious Affairs regarding the Registration of Marriage Certificate of Indonesian Citizens Held Abroad)*, Peraturan Menteri Agama No. 1/1994 tertanggal 2 April 1994 (Regulation of Minister of Religious Affairs No. 1/1994 dated April 2, 1994).

[477] Art. 59 (2) of MA 1974.

[478] Indonesia, Surat Keputusan Bersama Menteri Agama dan Menteri Luar Negeri tentang *Petunjuk Pelaksanaan Perkawinan Warganegara Indonesia di Luar Negeri (Joint Decision of the Minister of Religious Affairs and Minister of Foreign Affairs regarding Implementing Guideline on Marriage of Indonesian Citizens Abroad)* Surat Keputusan Bersama Menteri Agama dan Menteri Luar Negeri No. 589 Tahun 1999 No. 182/OT/99/01 tertanggal 13 Oktober 1999 (Joint Decision of the Minister of Religious Affairs and Minister of Foreign Affairs No. 589 of 1999 and No. 182/OT/99/01 dated October 13, 1999).

[479] Indonesia, *Peraturan Pemerintah tentang Prosedur Pengangkatan Anak (Government Regulation regarding the Procedure for Adoption),* Art. 7.

[480] *Ibid.,* Art. 1 sub-article (7).

performed according to the Indonesian Law, particularly through an authorized child care institution which must then be solemnized by a district court decision.[481] In relation to jurisdiction as mentioned above, district courts in Indonesia are the authorized ones.[482]

With respect to a power of attorney which is concluded abroad and will be exercised in Indonesia, it must be executed according to the formality regulations where it is made and must be legalized by an Indonesian representative.[483] This regulation is confirmed by the High Court and Supreme Court in their decisions.[484] The same principle is also applied to Will or Testament. A will or testament made abroad is stipulated in Art. 954 of BW. It is mentioned that a testament made abroad must be an authentic document in accordance with the laws where the document is produced. This authenticity or whether document is in line with the local law must be confirmed by a local notary. This document is legalized by an Indonesian representative where the document is produced.

Electronic Information and Transaction is stipulated in Law No. 11 of 2008 as amended to date (hereinafter referred to as the "**EIT Law**").[485] The EIT Law states that it applies to anyone who takes a legal act as stipulated in the EIT Law, either in the territory of Indonesia or outside Indonesia which has legal consequences in the territory of Indonesia and/or outside the territory of Indonesia and is detrimental to the interest of Indonesia. [486] The electronic information, electronic data and or electronic transaction

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[481] *Ibid.,* Art. 11 (2) *jo*. Art. 14 sub-article (c).

[482] Tiurma M. P. Allagan, *Intercountry Adoption in Indonesia* in *Indonesian Journal of International Law* in forthcoming 2018 edition.

[483] Regulation of the Minister of Foreign Affairs No. 09/A/KP/XII/2006/01 dated December 28, 2006, point 68 and 70 of the Attachment. Legalization of the document is only validation of the signature, excluding the content or substance of or described in the respective documents.

[484] Decision of the Supreme Court of the Republic of Indonesia, "Decision No. 3038/K/Pdt/1981 dated September 18, 1981". The authenticity of a power of attorney is subject to the formality regulations where it is concluded, and it has to be legalized by an Indonesian Representative. See also Decision of the Religious Affairs High Court, "Decision No. No. 60/Pdt.G/2008/PTA.Sby". See Hukumonline, "Kewajiban Legalisasi Dokumen Yang Ditandatangani di Luar Negeri" http://www.hukumonline.com/klinik/detail/cl2168/dokumen-yg-ditandatangani-di-luar-negeri, accessed September 1, 2016.

[485] Indonesia, *Undang-undang tentang Informasi dan Transaksi Elektronik (Law regarding Electronic Information and Transaction Law),* Undang-undang No. 11 Tahun 2008, LN No. 58 Tahun 2008 (Law No. 11 of 2008, SG No. 58 of 2008), as amended by Law No 19 of 2016 regarding the Amendment to Law No. 11 of 208 regarding the Electronic Information and Transaction.

[486] *Ibid*., Art. 2. "*Undang-undang ini berlaku untuk setiap orang yang melakukan perbuatan hukum sebagaimana diatur dalam Undang-undang ini, baik yang berada di wilayah hukum Indonesia maupun di luat wilayah hukum Indonesia dan/atau di luar wilayah hukum Indonesia dan merugikan kepentingan Indonesia.*" The Official Elucidation states: *"Undang-undang ini memiliki jangkauan yurisdiksi tidak semata-mata untuk perbuatan hukum yang berlaku di Indonesia dan/atau dilakukan oleh Warga Negara Indonesia, tetapi juga berlaku untuk perbuatan hukum yang dilakukan di luar wilayah hukum (yurisdiksi) Indonesia baik oleh Warga Negara Indonesia maupun warga negara asing atau badan hukum Indonesia maupun badan hukum asing yang*

wherever concluded must comply with the requirements of EIT Law, if it will be implemented in Indonesia.

The EIT Law stipulates electronic transactions under Chapter V, Art. 17-22. It states that an electronic transaction embodied in an electronic contract has a legal binding to the parties to the respective contract. If the contract has foreign element(s), the parties have the authority to choose the applicable law in their transaction, provided that it is in line with Indonesian PIL. In the event no choice of law is made by the parties, the applicable law shall be determined according to the principles of PIL.[487] The official elucidation states a very general explanation, yet the author believes that the applicable law shall be appointed base on the principle of the most connected law to the respective contract. The parties can also have the choice of court, either a court or arbitration or any other alternative dispute resolution. If no choice of court is made by the parties, it shall be determined by the principle of Indonesian PIL. In the elucidation, it is stated that the location of the basic presence of the parties or the location of effective place of the assets of parties shall be the choice of courts.[488]

Based on the discussion above, Indonesian PIL principles as stipulated in PIL's Three Skeleton Keys remain the same, save for the Principle of Nationality.

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memiliki akibat hukum di Indonesia, mengingat pemanfaatan Teknologi Informasi untuk Informasi Elektronik dan Transaksi Elektronik dapat bersifat lintas teritorial atau universal. Yang dimaksud dengan "merugikan kepentingan Indonesia" adalah meliputi tetapi tidak terbatas pada merugikan kepentingan ekonomi nasional, perlindungan data strategis, harkat dan martabat bangsa, pertahanan dan keamanan negara, kedaulatan negara, warga negara serta badan hukum Indonesia."

[487] *Ibid*., Art. 18. "*(1) Transaksi Elektronik yang dituangkan ke dalam Kontrak Elektronik mengikat para pihak. (2) Para pihak memiliki kewenangan untuk memilih hukum yang berlaku bagi Transaksi Elektronik internasional yang dibuatnya. (3) Jika para pihak tidak melakukan pilihan hukum dalam Transaksi Elektronik internasional, hukum yang berlaku didasarkan pada asas Hukum Perdata Internasional. (4) Para pihak memiliki kewenangan untuk menetapkan forum pengadilan, arbitrase, atau lembaga penyelesaian sengketa alternatif lainnya yang berwenang menangani sengketa yang mungkin timbul dari transaksi Elektronik internasional yang dibuatnya. (5) Jika para pihak tidak melakukan pilihan forum sebagaimana dimaksud pada ayat (4), penetapan kewenangan pengadilan, arbitrase, atau lembaga penyelesaian sengketa alternatif lainnya yang berwenang menangani sengketa yang mungkin timbul dari transaksi tersebut, didasarkan pada asas Hukum Perdata Internasional.*"

[488] *Ibid.* The Official Elucidation of Art. 18, "*(1) Cukup jelas. (2) Pilihan hukum yang dilakukan oleh para pihak dalam kontrak internasional termasuk yang dilakukan secara elektronik dikenal dengan* choice of law. *Hukum ini mengikat sebagai hukum yang berlaku bagi kontrak tersebut. Pilihan hukum dalam transaksi Elektronik hanya dapat dilakukan jika dalam kontraknya terdapat unsur asing dan penerapannya harus sejalan dengan prinsip Hukum Perdata Internasional. (3) Dalam hal tidak ada pilihan hukum, penetapan hukum yang berlaku berdasarkan prinsip atau asas hukum perdata internasional yang akan ditetapkan sebagai hukum yang berlaku pada kontrak tersebut. (4) Forum yang berwenang mengadili sengketa kontrak internasional, termasuk yang dilakukan secara elektronik, adalah forum yang dipilih oleh para pihak. Forum tersebut dapat berbentuk pengadilan, arbitrase, atau lembaga penyelesaian sengketa alternatif lainnya. (5) Dalam hal para pihak tidak melakukan pilihan forum, kewenangan forum berlaku berdasarkan prinsip atau asas hukum perdata internasional. Asas tersebut dikenal dengan asas tempat tinggal tergugat* (the basis of presence) *dan efektivitas yang menekankan pada tempat harta benda tergugat berada (*principle of effectiveness*).*"

6.3 Academic Bill of Indonesian PIL[489]

6.3.1 Background of the Bill of Indonesian PIL

The Bill of Indonesian PIL was drafted since Indonesia begun to realize that PIL was important when it started to stimulate foreign investment in the late 1960s. At that time, Indonesia drafted a law to ratify the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID"), extensively known as the "Washington Convention",[490] and also enacted the Foreign Investment Law.[491] The opportunity was seen as a chance to codify PIL rules in one law by Indonesian scholars at that time. Therefore, in the 1980s, a Green Paper on the Law concerning PIL was drafted by an academic team chaired by Mr. Teuku Radhi, which also included Mr. Sudargo Gautama, a prominent PIL scholar at that time.

The team produced the first academic bill known as the Bill of 1983. The Bill of 1983 was discussed on several occasions in different meetings, and was revised and re-issued in 1997, into the "**Bill of 1997**".[492] The Bill of 1997 was prepared on an article by article basis and was followed by an official elucidation, which included references to some international conventions, for instance, the intercountry adoption and international inheritance conventions. The Bill of 1997 consists of eight chapters and 46 articles.[493] The government of Indonesia gave a lower priority to the Bill of 1997. Notwithstanding the fact that the Bill has been put on hold for an indefinite period, it may well serve as a

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[489] T.M.P. Allagan, *The Bill on Indonesian Private International law,* NIPR *(Nederlands Internationaal Privaatrecht)* Vol. 33/3, 2015, (The Netherlands: T.M.C. Asser, 2015), pp. 390-403. This part is taken from the author's writing as mentioned before, with revision to any development occurred after the publication in 2015.

[490] Ratification of the ICSID by RI by Law No. 5 of 1968 regarding Dispute Settlements between the State and Nationals of Other States dated June 29, 1968, State Gazette No. 32 of 1968.

[491] Law No. 1 of 1967 regarding Foreign Investment which was then replaced by Law No. 25 of 2007 regarding Investment dated April 26, 2007, State Gazette No. 67 of 2007, Supplement No. 4724.

[492] Now, the complete text of the Bill is available in a book by Sudargo Gautama, *Hukum Dagang dan Arbitrase Internasional* (translation: International Commercial and Arbitration Law), Bandung: Citra Adhitya Bakti 1991, Annex 8.

[493] This Bill of 1997 consists of eight chapters and 46 articles. Chapter I (Art. 1) contains the general provisions. Chapter II (Arts. 2-17) contains the general principles of PIL. Chapter III (Arts. 18-19) contains the obligation provisions. Chapter IV (Arts. 20-21) contains the goods provisions, known as the *lex rei sitae* principle. Chapter V (Arts. 22-39) contains family matters. Chapter VI (Art. 40) contains the international inheritance provisions. Chapter VII (Arts. 41-44) contains the international civil procedure law in RI. The last one is Chapter VIII (Arts. 45-46) regarding the transitional and closing provisions. The Bill of 1997 provided provisions on the applicable law and jurisdiction but was silent on the question of recognition and enforcement of foreign judgments. However, Indonesia ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the "**New York Convention**") on October 7, 1981.

restatement of and the common opinion of PIL scholars (*communis opinio doctorum)* on Indonesian PIL.[494]

In March 2014, a new academic draft on PIL was re-discussed. The Bill of 1997 acted as the starting point of the discussions by a new team chaired by I.B.R. Supancana. This team worked for nine months before introducing a new academic draft on PIL issued in November 2014 and then revised in 2015,[495] hereinafter referred to as the "**Academic Draft**". This Academic Draft was issued by the National Law Development Agency (*Badan Pembinaan Hukum Nasional*) under the Department of Law and Human Rights of the Republic of Indonesia.

This writing will focus on the Bill of 1997, for the Academic Bill is in the process of discussion. Although it is not yet effective, it is worth to be stated in this research in order to give indications on how Indonesia will stipulate international mixed marriages. Though the Bill of 1997 covers the scope of PIL, this discussion is prioritized on matters related to international mixed marriage and any relevant matters.

The idea of codification of Indonesia PIL provisions remains significant for several reasons. The influence of globalization, particularly regional cooperation within ASEAN,[496] and the ease of making a contact and relationship with someone or any third party outside the territory of Indonesia were some of the main reasons to initiate the discussion of the Academic Draft.[497] In order to legislate on the cross-border activities of Indonesian citizens, a codification could provide protection and legal certainty for Indonesian citizens whose activities involve foreign elements.[498] PIL rules in Indonesia are spread out and scattered amongst other laws and regulations enacted afterward, for instance in the Investment Law, or in the intellectual property right law.[499] Some principles are reflected in the Indonesian Supreme Court's decisions which have become

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[494] See para. 1 of the Explanatory Memorandum of the Bill of 1997.

[495] The Bill on Indonesian PIL issued in 2014 was translated by the author and can be found in T.M.P. Allagan, *The Bill on Indonesian Private International law,* NIPR *(Nederlands Internationaal Privaatrecht)* Vol. 33/3, 2015, (The Netherlands: T.M.C. Asser, 2015), pp. 390-403. In 2015, the Bill was revised again by the team and the format was changed (no more articles and official elucidations), yet the content stays the same in general.

[496] The Association of Southeast Asian Nations or ASEAN was established on August 8, 1967 in Bangkok by the original members, i.e. Indonesia, Malaysia, the Philippines, Singapore and Thailand. Brunei Darussalam joined on January 7, 1984, followed by Vietnam on July 28, 1995, Lao PDR and Myanmar (Burma) on July 23, 1997 and, lastly, Cambodia on April 30, 1999. See http://www.asean.org/asean/about-asean/overview , last accessed on August 6, 2015.

[497] Proposal for the Academic Draft, pp. 1-3.

[498] See the preface to the Academic Draft by the chairman of the team, I.B.R. Suprancana, pp. (ii-iii).

[499] Law No. 25 of 2007 regarding Investment, State Gazette No. 67 of 2007. See also the previous elaboration of Art. 17 of AB regarding Intellectual property rights.

landmark decisions and provoke further discussions amongst scholars.[500] Therefore, the aspiration to codify PIL rules in one law is highly relevant and important for Indonesia.

6.3.2 General provisions

The main principles of the Bill of 1997 are laid down in Chapter II of the Bill. It mentions that Indonesian judges must also consider other laws and regulations which provide more specific regulations, if any. In the event that no specific regulation in the Bill of 1997 is available, judges must consider the general principles of PIL.[501] In the implementation of such general PIL principles in a particular case, Indonesian judges are given the authority to interpret such principle by considering the application of these principles in any relevant international conventions and/or the opinion of Indonesian PIL scholars. These regulations show that a judge has a strategic position in interpreting and adopting PIL principles in Indonesian cases.

6.3.2.1 Applicable law of a person

The applicable law of a person to determine whether or not he/she is capable to take or perform any legal actions is stated in Art. 13 of the Bill of 1997. It states that:

> *"(1) Status dan kewenangan hukum seorang warga negara Indonesia yang berada di luar negeri tunduk pada hukum Indonesia. (2) Status dan kewenangan hukum dari orang asing yang berada di dalam wilayah negara Republik Indonesia tunduk pada hukum nasionalnya. (3) Status dan kewenangan hukum dari orang asing yang secara terus –menerus menetap di Indonesia selama 10 (sepuluh) tahun tunduk pada hukum Indonesia."*[502]

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[500] Therefore, the role of judges and scholars is important in the field of Indonesian PIL. See Sudargo Gautama, *Hukum Perdata Internasional Indonesia Jilid I Buku ke 1* (translation: Indonesian Private International Law Part I, 1st Book), (Bandung: Alumni 2008), pp. 214-216.

[501] Art. 2 of the Bill of 1997, para. 3 '*…tentunya dalam hal ini, bagi hakim atau pelaksana hukum lainnya, diberi kekuasaan untuk menafsirkan apa yang sebenarnya yang diartikan dengan asas-asas umum Hukum Perdata Internasional. Dalam melakukan tugasnya pelaksana hukum harus memperhatikan selain daripada teori-teori umum yang diajarkan dalam text book, juga pendapat para penulis, peraturan-peraturan lain di dalam konvensi-konvensi internasional mengenai hal yang bersangkutan, pendirian dari para sarjana hukum yang khusus berspesialisasi dalam bidang Hukum Perdata Internasional, monografi-monografi, yurisprudensi dan pendapat para sarjana terbanyak (communis opinion doctorum).*' Translation: "… of course in this matter, judges and the other legal practitioners, are given the authority to interpret what is the actual meaning of general principles of Private International Law. In performing their duties, legal practitioners must take into account, in addition to the general theories taught in text books, writers' opinions, other regulations in international conventions concerning the matters concerned, positions of legal scholars who specifically specialize in the field of Private International Law, monographs, jurisprudence and opinions of most scholars *(communis opinion doctorum)*."

[502] This article equals to Art. 13 of the Bill of 1997.

Translation*:* "(1) The legal status and authority of an Indonesian citizen who is abroad shall be subject to the Indonesian Law. (2) The legal status and authority of a foreigner who is within in the territory of Indonesia, shall be subject to his national law. (3) The legal status and authority of a foreigner who continuously live in Indonesia for 10 (ten) years shall be subject to the Indonesian law."

The provisions above show that Indonesian citizens are subject to the Indonesian law in respect of their legal status and authority, including Indonesian citizens who are abroad. The capacity of foreigners is in line with the main principle as described in the first paragraph. Similarly, foreign citizens shall be subject to their national law. An exception is described in the third paragraph. It states that an exception to the Principle of Nationality is made for a foreign citizen who has lived in the territory of Indonesia for ten consecutive years. This exception is acceptable and necessary because the Indonesian law becomes the law which has the closest connection after ten years residency of the respective person.

The other provisions, Art. 5 and Art. 6 explain about the applicable law in particular circumstance, namely a person who has a dual or multi-nationality,[503] and any stateless person or *apatride*.[504] In case of dual or multi nationalities, the applicable law is the law appointed by the most effective and active nationality of the person.[505] If one of the

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[503] Art. 5 of the Bill of 1997. *"(1) Dalam hal hukum nasional seseorang dinyatakan berlaku, akan tetapi orang tersebut mempunyai dua kewarganegaraan atau lebih, hukum yang berlaku adalah hukum yang ditetapkan oleh kewarganegaraan yang paling efektif dan aktif. (2) Apabila terjadi permasalahan mengenai kewarganegaraan dari seseorang yang mempunyai dua kewarganegaraan atau lebih dan salah satu dari kewarganegaraan tersebut adalah kewarganegaraan Indonesia, hukum yang berlaku adalah hukum Indonesia."* Translation: "(1) In the event that the national law of a person is declared applicable, but the person concerned has two or more nationalities, the applicable law shall be the law stipulated by the most effective and active nationality. (2) In the event of any issue of nationality of a person who has two or more nationalities and one of the nationalities is Indonesian nationality, the applicable law shall be the Indonesian law."

[504] Art. 6 of the Bill of 1997. *"(1) Bagi seseorang yang menurut hukum Indonesia adalah orang yang tak berkewarganegaraan berlaku hukum dari tempat orang tersebut mempunyai tempat kediaman sehari-hari. (2) Ketentuan sebagaimana dimaksud dalam ayat (1) hanya berlaku sepanjang hal itu menyangkut status dan kewenangan untuk bertindak dalam hukum, sedangkan mengenai hal-hal lainnya, orang yang tak berkewarganegaraan dianggap sebagai orang asing."* Translation: "(1) For a person who according to the Indonesian law is a stateless person, the law of the place where such person has daily residence shall be applicable. (2) The provisions as referred to in paragraph (1) shall only apply insofar as it relates to the status and authority to act by laws, while in relation to other matters, a stateless person shall be deemed as a foreigner."

[505] Elucidation of Art. 5 of the Bill of 1997. *"Apabila ternyata prinsip nasionalitas membawa kesulitan, karena orang bersangkutan mempunyai lebih dari satu kewarganegaraan (kewarganegaraan rangkap, bipatride atau multipatride), maka sesuai dengan pendapat modern, dipergunakan prinsip nasionalitas yang paling efektif, aktif atau yang benar-benar hidup (effective, actieve atau virtuele nationalitiet), yaitu kewarganegaraan yang dapat dibuktikan oleh niatnya, fakta-fakta yang bersangkutan mengenai cara hidupnya dan penerimaan masyarakat sekitarnya."* Translation: "In the event that the nationality principle in fact causes difficulties, because the person concerned has more than one nationality (dual nationality, *bipatride* or *multipatride*), in accordance with modern opinion, the most effective, active or virtual nationality *(effective, actieve atau virtuele*

nationalities is Indonesia, then the applicable law is the Indonesian law. In case of stateless, the applicable law shall be the law of country where the respective stateless person has his/her habitual residence.[506]

The Bill of 1997 lays down the principle of nationality as the main principle in determining the law applicable to personal status. When a person has a dual nationality, the applicable law shall be the most effective and active nationality. The latter phrase refers to scholar's opinions. Active and effective nationality is determined by the actual residence, center of interest, family relationship, participation of social and state life, bound or attached a feeling to a particular country.[507] Tests of active nationality are related to, among others, the domicile or habitual residence of the person concerned, "seat" of his affairs, language spoken by such person, whether he exercises his right to vote, taxes, and generally the preference for one of the nationalities manifested by his behaviour (the "active" or "sociological") nationality.[508] In this situation, the choice between two or multinational laws is based on the relevant or connected national law of the person in question.

In the event that Indonesian nationality is involved in a case of dual or multi-nationality, the Indonesian law shall apply. This settlement is taken based on the approach of "closest to the *lex forum*". In this situation, the case is expected to be settled before an Indonesian district court, thus the Indonesian law is considered as the law which has the closest connection. These provisions show that the Principle of Nationality does not give an answer about the applicable law and Indonesia employs the basic thought of PIL, namely the most connected law.

Art. 6 of the Bill of 1997 provides for stateless persons. The principle of nationality cannot stipulate any applicable law because the nationality is unavailable. Therefore, the applicable law shall be the local law of country where they have their habitual

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nationalitiet) nationality principle shall be used, namely a nationality the intention of which can be proven, facts related to his/her way of life and acceptance of the surrounding community. "

[506] Elucidation of Art. 6 of the Bill of 1997. *"Hukum Indonesialah yang harus menentukan apakah seseorang apatride atau tidak. Jika seseorang tidak berkewarganegaraan (apatride), maka mengenai hal-hal yang menyangkut status dan kewenangan dalam hukum keluarga akan dipergunakan hukum dari negara tempat kediamannya sehari-hari (residence habituelle). Akan tetapi mengenai hal-hal lain, orang yang tidak mempunyai kewarganegaraan, tetap berstatus sebagai orang asing."* Translation: "The Indonesian law shall determine whether or not a person is stateless. If a person is a stateless person (*apatride*), matters related to the status and authority in the family law shall use the law of his/her daily residence *(residence habituelle).* However, in relation to other matters, a stateless person shall still have the status of foreigner."

[507] *Ibid,* p. 20. See also Sudargo Gautama, *Hukum Perdata Internasional Indonesia, Jilid II Bagian III, buku Ke-empat* (Bandung: Alumni, 1989), p. 274

[508] Leenard Palsson, *Marriage and Divorce in Comparative Conflict of Laws* (Leiden, A.W. Sijthoff, 1974), pp. 84-86.

residence. It is acceptable because the local law is the most connected law to the person in question. Bearing in mind the case of dual or multi nationality and due to consistency, it is advisable that the habitual residence determines the applicable law in both cases, either dual or multi nationality or stateless. In addition, it is still in accordance with the basic thought of Indonesian PIL, namely the most connected law.

The provisions above are in line with Art. 12 of the Bill of 1997. It states that:

> "(1) *Kemampuan dan ketidakmampuan seseorang untuk bertindak dalam hukum diatur oleh hukum nasionalnya. (2) Orang asing yang melakukan suatu perbuatan hukum di Indonesia dianggap mempunyai kemampuan untuk melakukan perbuatan itu sepanjang menurut hukum Indonesia ia mampu melakukannya. (3) Kemampuan sebagaimana dimaksud dalam ayat (2) tidak berlaku bagi perbuatan hukum di bidang Hukum Kekeluargaan dan Hukum Waris. (4) Sepanjang menyangkut perbuatan hukum yang berkenaan dengan benda tidak bergerak, kemampuan hukum seseorang untuk melakukan perbuatan hukum yang demikian diatur oleh hukum Negara tempat benda tidak bergerak tersebut terletak.*"

Translation: "(1) The capacity and incapacity of a person to act by laws shall be provided for by his/her national law. (2) A foreigner who takes a legal action in Indonesia shall be considered to have the capacity to take the legal action insofar as according to the Indonesian Law he/she is capable to do so. (3) The capacity as referred to in paragraph (2) shall not apply to any legal action in the Family Law and Inheritance Law. (4) Insofar as related to a legal action concerning immovable goods, the legal capacity of a person to take such a legal action shall be provided for by the law of State in which the immovable goods are located.

The elucidation of this article mentions that Art. 12 stipulates the capacity to take a legal action.[509] The first paragraph is consistent with Art. 13 which stipulates the capacity of a person in general, whereby the national law applies to determine the personal status of a person. The remaining paragraphs of Art. 12 stipulate exceptions of the above. First, the Indonesian law applies in determining the capacity of a foreigner if the respective foreigner would like to take a legal action in Indonesia. The Indonesian law applies for the protection for Indonesian society and legal certainty, in addition, Indonesia is the location where the legal action is taken. It is in line with the principle of *lex loci celebrationis*. In relation to this, the Indonesian law applies independently of the national law of the respective person. However, this provision does not apply to any legal action related to the family and inheritance law. It is acceptable, because those

[509] Elucidation of Art. 12 (1) of the Bill of 1997. *"Ayat ini khusus mengatur hal kemampuan untuk melakukan perbuatan hukum"* Translation: This paragraph particularly provides for the capacity to take a legal action.

fields are closely related to personal status which must be according to the national law.[510]

Another exception is about a legal action on immovable goods as referred to in paragraph 4 of Art. 12 of the Bill of 1997.[511] It states that legal capacity shall be in accordance with the local law of country where the immovable goods are located. This provision is an exception to the principle of nationality which can be set aside in respect of immovable goods. This provision is also an exception to the second paragraph stating that the Indonesian law applies to a foreigner who would like to take a legal action in Indonesia. This stipulation applies to a foreigner who is subject to the Indonesian law because he/she has permanent residence in Indonesia legally, and according to the Indonesian law, such legal action is allowed for foreign citizens.

The next articles, Art. 14, 15, 16, 17, of the Bill of 1997 demonstrate consistent implementation of the National Law in Personal Statute and its exceptions. The Principle of Nationality in determining, respectively, the capacity of a person or foreigner who is in Indonesia, missing persons and guardianship.

Article 14 of the Bill of 1997 states that *"Tindakan-tindakan hukum sementara yang dipandang perlu oleh Pengadilan Indonesia sebagai orang asing yang telah meninggalkan domisili atau tempat kediamannya di Indonesia diatur menurut Hukum Indonesia."* Translation: Temporary legal actions deemed necessary by an Indonesian Court as foreigners who have left their domicile or residence in Indonesia shall be provided for pursuant to the Indonesian Law.[512] The Indonesian law applies because

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[510] Elucidation of Art. 12 (2) of the Bill of 1997. *"Ayat ini dimaksudkan untuk melindungi masyarakat dan kepastian hukum Indonesia, yakni di negara tempat perbuatan hukum itu dilakukan. Akan tetapi, hukum Indonesia berlaku terlepas dari apakah ia menurut hukum nasionalnya mempunyai atau tidak mempunyai kemampuan hukum. Ketentuan ini tidak berlaku bagi perbuatan-perbuatan hukum kekeluargaan dan waris."* Translation: This paragraph is intended to protect Indonesian society and legal certainty, namely a country in which the legal action is taken. However, the Indonesian law applies regardless whether or not he/she has a legal capacity according to his/her national law. This provision does not apply to family and inheritance legal actions.

[511] Elucidation of Art. 12 (4) of the Bill of 1997. *"Ayat ini merupakan pengecualian pula dari asas nasionalitas, sepanjang berkenaan dengan benda tak bergerak, karena hukum letaknya benda tak bergerak tersebut dinyatakan berlaku. Ayat ini merupakan pengecualian dari ayat (2), akan tetapi hanya terbatas pada orang asing yang menetap di Indonesia secara sah dengan tidak terputus, serta menyangkut kewenangan untuk melakukan perbuatan hukum yang diperkenankan oleh Hukum Indonesia untuk orang asing."* Translation: This paragraph is also an exception to the principle of nationality, insofar as related to immovable goods, because the law of country where the immovable goods are located applies. This paragraph is an exception to paragraph (2), but only limited to foreigners who stay in Indonesia legally and continuously, as well as related to authority to take a legal action allowed by the Indonesian Law for foreigners.

[512] Elucidation of Art. 14 of the Bill of 1997. *"Oleh karena ini, hanya mengenai tindakan-tindakan yang bersifat sementara (provisional), seperti antara lain yang perlu diambil berkenaan dengan tidak hadirnya seseorang, pengurusan harta benda, tindakan pemeliharaan status quo, dan termasuk hukum acara, maka beralasan bahwa hukum nasional orang asing yang bersangkutan tidak dipergunakan."*

the temporary actions are taken to maintain assets, and status quo and including proceeding law in relation to the absence of the foreigners (or the person *in absentia*). Therefore, it is acceptable that the Indonesian law applies in this particular event.

Art. 15 of the Bill of 1997 states that "*Hal hilangnya orang asing dan akibat-akibat hukumnya tunduk pada hukum nasionalnya. Akibat hukum yang menyangkut benda-benda tidak bergerak yang terletak di wilayah Negara Indonesia tunduk pada hukum Indonesia.*"[513] Translation: The issue of missing foreigners and its legal consequences shall be subject to their national law. Legal consequences in relation to immovable assets located in the territory of Indonesia shall be subject to the Indonesian law.

The provisions above deals with a missing person or a person *in absentia*. The national law of the missing person is the applicable law with regard to his absence and legal consequences thereof. An exception is made for immovable assets located in the territory of Indonesia, which will be subject to the Indonesian law.[514] These regulations are acceptable and reasonable and in accordance with the *lex rei sitae* principle described in Art. 17 of AB.

Article 16 of the Bill of 1997 states that "*Pengadilan Indonesia tidak dapat menempatkan orang asing di bawah pengampuan berdasarkan suatu alasan yang tidak dibenarkan oleh Hukum Indonesia, meskipun alasan itu dibenarkan oleh hukum nasional orang asing tersebut.*" Translation: An Indonesian Court may not place a foreigner under guardianship based on a ground which is not justified by the Indonesian Law, although the ground is justified by the national law of the foreigner.

The provision above reflects the application of the national law of a foreigner to the Indonesian public policy.[515] The principle of nationality is waived if the provisions of foreign guardianship are not in line with the Indonesian law. This provision states that if the basis for guardianship is not in line or cannot be justified by the Indonesian law, such foreign guardianship must be set aside and cannot be enforced in Indonesia.

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[513] This article equals to Art. 15 of the Bill of 1997.

[514] Elucidation of Art. 15 of the Bill of 1997. *"Sesuai dengan prinsip nasionalitas yang dianut untuk status personal, maka hilangnya seseorang ditentukan oleh hukum nasionalnya. Akan tetapi, mengenai hubungannya dengan benda-benda tak bergerak, yang berlaku adalah hukum letaknya benda itu."* Translation: In line with the principle of nationality embraced for personal statue, a missing person shall be determined by his/her national law. However, in relation to his/her immovable goods, the law in which the goods are located shall apply.

[515] Elucidation of Art. 16 of the Bill of 1997. *"Pengampuan termasuk bidang status personal. Tetapi, apabila hukum nasional orang asing tersebut membenarkan pengampuan padahal alasan itu tidak dibenarkan oleh Hukum Indonesia, maka hukum nasional orang asing tidak dipergunakan, sesuai dengan asas ketertiban umum."* Translation: Guardianship includes the field of personal status. However, if the national law of the foreigner justifies guardianship while the reason therefor is not justified by the Indonesian law, the national law of the foreigner is not used, in accordance with the public policy principle.

Guardianship in the Indonesian law is public policy which cannot be violated. In short, this foreign guardianship provision must be in line with the Indonesian law. A foreign law on guardianship can only be applied if it does not contradict the Indonesian law.

Article 17 of the Bill of 1997 states that "*Pengampuan bagi Warga Negara Indonesia yang berdomisili atau bertempat kediaman di luar negeri tunduk pada hukum Indonesia."* Translation: Guardianship for Indonesian Citizens who have domicile or residence abroad shall be subject to the Indonesian law.

The article above shows that the Indonesian law is applicable to its citizens who are abroad. For them, the Indonesian law shall still apply although they have their residence abroad and they have close connection with the local law. However, in this specific provision on guardianship, Indonesia law sets aside the applicability of the foreign law for public policy reason.

Those provisions show that the Indonesian law sets aside the foreign regulation on guardianship which applies to (a) foreigners in the territory of Indonesia and (b) Indonesian citizens who are abroad. In respect of guardianship, Indonesia provides further protection for its citizens due to the ambience of the situation. When a person is under *curatele,* he/she is incapable or not entitled to take any legal actions anymore. It is the opposite situation to *pendewasaan (handlichting)* whereby a child is legally considered as an adult and therefore, has a legal capacity equal to an adult[516]. *Curatele* makes an adult who already has the capacity to take any legal actions to be stated incapable. This statement makes him/her is in a position to be unable to make any decision on his/her life or assets obtained by him/her before. This situation is very sensitive and particular. Therefore, any judgement must be given incredibly prudent. Due to this, Indonesian regulations force a judge or his official representative to personally examine the condition of the person in question. In relation to this, a decision of the Supreme Court cancelled a district court decision on *curatele*, because the judge did not make any examination of the condition of the person in question who also had (at that time) his residency in Australia.[517]

Since Indonesia considers that this situation is significant, it provides particular protection. Therefore, those provisions override any foreign regulation which is not in

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[516] Art. 424 para (1) of BW. *"Anak yang telah dinyatakan dewasa, dalam segala hal sama dengan orang dewasa."* Translation: A child who has been declared adult, in all respects shall be the same as adult. In Dutch: *"De meerderjarige verklaarde staat in alles met den meerderjarige gelijk."*

[517] The Indonesian Supreme Court cancelled a Decision of the South Jakarta District Court No. 258/Pdt.P/2007/PN Jaksel. The Supreme Court found that the decision was not in line with Art. 439 of BW as the judge should hear all family members and or any relevant parties or the obligation of *audi et alteram partem* (obligation to listen to all party). The complete news is available at Hukumonline, http://www.hukumonline.com/berita/baca/hol18857/ma-batalkan-penetapan-pengampuan-prof-sudargo.

line or contradicts the Indonesian Regulation. In this regard, it also overrides the foreign regulation of a place in which Indonesian citizens have their residency.

The general provisions on personal status above describe that the applicable law of a person is primarily determined by his/her national law. In particular situations, the national law is assisted by the principle of the most connected law which appears in the concept of "Habitual Residence" or "the most connected law of the forum". Exception is made and available for immovable assets (*lex re sitae*) and the mandatory rules due to the essence or character provisions which require extra protection.

6.3.2.2 Renvoi

The doctrine of *renvoi* (referral), namely single *renvoi* or remission to the domestic law, is applied in Article 3 of the Bill of 1997. It states that: "*Dalam hal hukum nasional seseorang dinyatakan berlaku, akan tetapi hukum nasional orang tersebut menunjuk kembali pada hukum Indonesia sebagai hukum yang berlaku baginya, hukum yang diterapkan adalah hukum intern Indonesia.*" Translation: In the event that the national law of a person is declared applicable, but the national law of such person refer back to the Indonesian law as the law applicable to such person, the applied law shall be Indonesian internal Law.

The stipulation above describes Indonesia's acceptance of *renvoi or remission,* which is in line with Indonesian district courts a long time ago.[518] However, the Bill of 1997 is silent about transmission to another foreign legal system (*penunjukkan lebih jauh*). It would be better if the Bill of 1997 stipulates the provisions on this issue to avoid any doubt.

The Bill of 1997 contains no limitation with regard to *renvoi*; it seems that it applies to any PIL case or PIL legal relationship. However, *renvoi* has a limited scope and it will not be extended to apply to a contractual relationship. The fact that *renvoi* does not apply to a contractual relationship is acceptable. In the event that there is a choice of law agreed between the parties, the choice of law namely the substantive law without PIL rules or any reference to foreign law will be considered as the applicable law. PIL rules lead to a possibility of *renvoi* or any further transmission. Any application of *renvoi* or transmission in a contractual relationship will result in the rights and obligations of the parties being determined by a different law, instead of the one chosen by the parties.

[518] Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia,* pp. 89-118. In addition to his book, *Hukum Perdata Internasional Indonesia, Buku Ketiga,* (translation: Indonesian Private International Law, Third Book) (Bandung: Eresco, 1988), pp. 144-163.

This, in the first place, is against the intention of the parties and can be against the expectations of the parties to the relevant agreement.[519]

Based on the limitation above, *renvoi* shall only be applied to family matters. In order to avoid any misunderstanding, *renvoi* will be applied in any case involving PIL and it is recommended to add limitations in the next passed Bill.

Despite the points above which can be added to the Bill of 1997, the Bill does explicitly demonstrate the acceptance of single *renvoi* in the Indonesian PIL system. It is in line with the common opinion of Indonesian PIL scholars. To date, there is no Indonesian PIL scholar who refuses to recognize *renvoi*. They mention reasonable reasons, among others, in the event that the foreign law refers back to the Indonesian law and the settlement of case shall be more simple because the judge will apply its own law.[520] They certainly know their own law better than that of other countries. This mechanism also avoids Indonesian judges from accusation of being judicial chauvinism.[521] Whether or not it is still relevant to the current situation, the discussion will be further elaborated in Sub-chapter 7.

6.3.2.3 Classification or qualification

Article 7 of the Bill of 1997 provides the classification or qualification in Indonesian PIL. It states that "*Apabila di dalam suatu sengketa di muka pengadilan Indonesia hukum asing yang harus berlaku, akan tetapi antara hukum asing yang bersangkutan dan hukum Indonesia terdapat perbedaan kualifikasi, kualifikasi hubungan hukum tersebut ditentukan berdasarkan hukum Indonesia.*" Translation: In the event that in a dispute before an Indonesian court, a foreign law must be applicable, but between the foreign law concerned and the Indonesian Law, there is a difference in qualification, qualification of the legal relationship shall be determined by the Indonesian law.

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[519] The proposal for the Bill of 2015 refers to the writings of Sudargo Gautama on the doctrine of *renvoi.* See the proposal for the Bill of 2015, pp. 14-16. It refers to Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia,* pp. 89-118. Also, his book, *Hukum Perdata Internasional Indonesia Jilid II Part 2, Buku Ketiga,* (translation: Indonesian Private International Law, Third Book) (Bandung: Eresco, 1988), pp. 144-163.

[520] Elucidation of Art. 3 of Bill 1997. *"Pasal ini menunjukkan bahwa penunjukan kembali (renvoi) diterima dalam sistem Hukum Perdata Internasional Indonesia. Hal ini akan mengakibatkan lebih banyak dipergunakannya hukum intern Indonesia. Dengan demikian akan diperoleh jaminan bahwa pemakaian hukum itu tepat, karena hakim Indonesia tentunya lebih mengenal sistem hukumnya sendiri daripada sistem hukum negara asing."* Translation: This article shows that renvoi is accepted in Indonesian PIL's system. This will cause more of Indonesian law as the application law. Therefore, the guarantee that of the Indonesian law application is accurate, will be obtained, because the Indonesian judge should know his law better than any foreign law.

[521] Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia,* (Bandung: Binacipta, 1987), pp. 98-101.

The Bill stipulates the Indonesian law as the applicable law (the *lex fori*) to be applied in order to determine the legal category of any PIL case.[522] The Bill does not take into consideration the substantial or real connection of facts in the respective case, or the division of substantive and procedural matters as well as the *lex cause* of the classification. Any classification is undertaken based on the principle of *lex fori*.

The provision above is necessary, but it must be understood that the case in question is a PIL case. Therefore, it cannot be settled as a domestic case. The foreign law which is connected to the respective case must not be abandoned, nor become the only or ultimate source of classification. It must be used side by side with the *lex fori* in order to understand the international characteristics of the relevant case.

Art. 8 of the Bill of 1997 states that "*Apabila dalam suatu peristiwa atau hubungan HPI harus berlaku hukum dari suatu Negara yang mengenal suatu sistem Hukum Antar Tata Hukum Intern, hukum yang dipakai adalah hukum yang ditentukan oleh kaidah-kaidah Hukum Antar Tata Hukum Intern itu.*" Translation: "If in a PIL event or relationship, the law of a State which recognizes an Internal Conflict of Laws system must apply, the law used shall be the law determined by the principles of such Internal Conflict of Laws."

This provision is to confirm that any PIL legal relationship and or case shall be settled in the framework of the Conflict of Laws of the relevant states. Indonesian PIL scholars are of the opinion that a PIL legal relationship and or case is also a legal relationship and or case of Inter-Local Law, Intergroup Law, Interfaith Law, if the applicable law of the respective state recognizes legal pluralism.[523]

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[522] Elucidation of Art. 7 of the Bill of 1997. *"Untuk kualifikasi dipergunakan hukum dari forum hakim (lex fori). Misalnya, apabila menurut hukum negara asing, suatu peristiwa hukum dianggap sebagai peristiwa yang termasuk Hukum Waris, akan tetapi oleh hukum Indonesia peristiwa tersebut dianggap merupakan peristiwa harta benda perkawinan, maka akan digunakan kualifikasi menurut hukum Indonesia dengan menganggap peristiwa itu sebagai hubungan harta benda."* Translation: "For qualification, law of the judge's forum (*lex fori*) is used. For example, if according to the law of a foreign country, a legal event is considered as an event included in the Inheritance Law, but by the Indonesian Law, the event is considered as a marital asset event, qualification according to the Indonesian law shall be used by considering the event as a marital asset relationship."

[523] Elucidation of Art. 8 of the Bill of 1997. *"Di sini diterima bahwa pada pokoknya, tiap persoalan Hukum Perdata Internasional harus diterapkan pula dalam kerangka Hukum Antar Tata Hukum Intern (Hukum Antar Tempat, Hukum Antar Golongan, Hukum Antar Agama) dari negara bersangkutan. Hal ini sesuai dengan apa yang diterima oleh penulis-penulis Hukum Perdata Internasional dan juga dalam perumusan Konvensi-konvensi Hukum Perdata Internasional. Tiap persoalan Hukum Perdata Internasional, pada hakekatnya merupakan pula persoalan Hukum Antar Tempat, Hukum Antar Golongan, Hukum Antar Agama, apabila hukum nasional negara yang harus diperlukan itu memang mengenal sistem yang pluralistik."*

6.3.2.4 Public policy

Article 4 of the Bill of 1997 deals with Indonesian public policy. It is stated that: "*Kaidah-kaidah hukum asing yang seharusnya berlaku menurut ketentuan-ketentuan HPI, tidak dipergunakan bilamana kaidah-kaidah asing tersebut bertentangan dengan ketertiban umum dan kesusilaan.*" Translation: The principles of foreign law which should be applicable according to the provisions of PIL, shall not be used if the foreign principles contradict public policy and morality.

It provides that when a foreign law has been determined by the Indonesian PIL as the applicable law and that law contradicts Indonesian public policy and moral values, the application of that foreign law should be prevented; therefore, the Indonesian law shall be applied in the case in question. It is specifically laid down that a foreign law which should be applied according to the provisions of PIL of the state will no longer be applied if it is extremely contradictory (manifest incompatible) to the fundamental principles of Indonesian law.[524]

The Bill of 1997 is silent about the meaning or definition of public policy and good morals; in other words, there is no explanation of these provisions/terms. Bearing in mind that public policy is a general and abstract notion, at the same time it is a relative notion. It changes through time and place. The context is subject to constant evolution and reflects the current state of values and morality.[525] Therefore, it is open to interpretation and its extent can be very broad.

However, it is accepted in Indonesian PIL rules that public policy must be used as an 'emergency measure' or an *ultimum remidium*. It must only apply to an unavoidable situation and when the application of a foreign law is a manifestation which is incompatible with Indonesian fundamental principles.[526] Nevertheless, courts, being the

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[524] Elucidation Art. 4 of the Bill of 1997. *"Dengan diterimanya konsep "Ketertiban Umum" yang selalu diperlukan sebagai pengecualian, maka hukum Indonesia ialah hukum yang harus berlaku, apabila hukum asing yang seharusnya dipergunakan menurut ketentuan-ketentuan Hukum Perdata Internasional Indonesia secara bertentangan dengan asas-asas hukum Indonesia (manifest incompatible)."* Translation: "By accepting the concept "public policy" which is always necessary as an exception, the Indonesian law shall be the law which must be applicable, if a foreign law which should be used according to the provisions of Indonesian Private International Law contradict with the principles of Indonesian law (*manifest incompatible*)."

[525] *Ibid*. p. 1457.

[526] See the explanation and writing of Sudargo Gautama in respect of the same which serve as the reference of such proposal. Soedargo Gautama, *Hukum Perdata Internasional Indonesia, Jilid II Bagian Ketiga, Buku ke-4* (translation: Indonesian Private International Law, Chapter II 3th Part, 4th Book), (Djakarta: Kinta, 1964), p. 5. See also Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia,* (Bandung: Binacipta, 1987), pp. 134-135.

only official institution which can directly apply this principle, must filter the application of public policy when making their decisions so as to avoid judicial chauvinism.

It is advisable to insert an elucidation stating that the rejection does not refer to the content of foreign law as such, but merely denies the consequences originating from the application of foreign law or recognition and enforcement of a foreign judgement. The rejection must be made because the particular foreign law, judgement or arbitral award is regarded as harmful or offensive for Indonesia, while at the same time, Indonesian values and principles are too fundamental to be set aside.[527] It is advisable to state in the Bill that judges have the authority to interpret and specify the public policy. In applying the given authority, judges are obligated to explain a particular value which is violated and its connection with Indonesian public policy.

The Bill can provide in its elucidation, an example which is related to a marriage solemnized or concluded abroad or outside of the territory of Indonesia with a possible significant contradiction with the Indonesian law. For instance, same-sex marriages which are validly or officially recognized in the country in which they took place, cannot be acknowledged and registered in Indonesia for public policy reason.

6.3.2.5 Application of Foreign Law

Art. 10 of the Bill of 1997 states that "*Apabila hukum suatu negara asing yang seharusnya diterapkan tidak dapat diketahui dengan pasti dan jelas oleh hakim, hukum yang diterapkan adalah Hukum Intern Indonesia.*" Translation: If the law of a foreign state which should be applied cannot be known exactly and clearly by a judge, the applied law shall be the Indonesian Internal Law.

It states that in the event that a foreign law is unknown, cannot be found and a judge does not have any confidence to apply the foreign law in question, the judge must apply the Indonesian law, meaning the Indonesian law without PIL regulations (*sachnorms*).[528] This situation is only allowed after a judge has elaborated and discussed

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[527] Ionna Thoma, *Public Policy,* in *Encyclopedia of Private International Law*, (ed.) Jürgen Basedow, Giesel Rühl, Franco Ferrari, Pedro De Miguel Asensio, (Cheltenham: Edward Elgar Publishing Limited, 2017), pp. 1454-1455.

[528] The Elucidation of Art. 10 of the Bill of 1997. *"Dalam pasal ini diterima prinsip bahwa hukum asing akan berlaku apabila Hukum Perdata Internasional Indonesia menentukan demikian. Akan tetapi, apabila ternyata bahwa hukum asing itu tidak dapat diketahui dengan pasti, jelas dan secara meyakinkan oleh hakim, maka hukum intern Indonesia sebagai hukum dari forum hakim (lex fori), beralasan untuk diterapkan. Hukum asing bukan suatu fakta yang harus dibuktikan, tetapi tetap dipandang sebagai "hukum". Akan tetapi dalam praktek, jika kebetulan yang dihadapi adalah suatu hukum yang sukar dikenal, karena tidak cukup tersedia publikasi atau ahli-ahli hukum yang dapat menerangkan mengenai keadaan hukum dari negara yang bersangkutan, apabila hakim Indonesia mempergunakan hukum yang dikenalnya sendiri, yaitu hukum Indonesia. Hal ini baru dapat dilakukan setelah ia mengadakan usaha secara sungguh-sungguh untuk mencari dan*

or looked for any information from scholars, academic writings or journals, as relevant. He/she cannot ignore the evidence given by the parties before the court to prove the foreign law. In other words, the judge is prohibited from applying his national law directly.[529]

6.3.2.6 Locus rigit Actum

Article 11 of the Bill of 1997 provides the provisions on the law applicable to legal actions. It states that:

> *"(1) Selama tidak ditentukan lain oleh UU ini atau peraturan perundang-undangan Indonesia lainnya, sahnya suatu bentuk perbuatan hukum ditentukan oleh hukum dari negara tempat perbuatan itu dilakukan. (2) Bagi perbuatan hukum yang berkenaan dengan benda tidak bergerak, hukum dari negara tempat benda itu terletak mengatur bentuk yang diisyaratkan untuk sahnya perbuatan hukum itu."*

Translation: Insofar as not otherwise determined by this Law or other Indonesian laws and regulations, the validity of a legal action shall be determined by the law of the country in which such legal action is taken. (2) For a legal action related to immovable goods, the law of the country in which the immovable goods are located shall provide for the required form for the validity of such legal action.

The provision above lays down the general principle of PIL, namely *locus rigit actum* or *lex loci celebrationis.* This principle is applied in Indonesia by Art. 18 of AB. This principle prevails in general, and its limitation is stated in the second sentence whereby a legal action in respect of immovable assets is subject to the law of country where the immovable assets are located. It is in line with the principle of *lex rei sitae.*[530]

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memperoleh bahan-bahan keterangan mengenai hukum asing tersebut. Dalam hal ini sudah terang hakim tidak boleh bertindak secara a priori, dan memakai hukum negaranya sendiri tanpa terlebih dahulu secara seksama memperhatikan pembuktian oleh para pihak. Sehingga hakim harus benar-benar yakin bahwa si hukum asing tersebut tidak dapat diketahuinya dengan pasti dan jelas."

[529] See also the explanation and writing of Sudargo Gautama in respect of the same which become the reference of such proposal. Soedargo Gautama, *Hukum Perdata Internasional Indonesia, Buku ke-6* (translation: Indonesian Private International Law, 6th Book), (Bandung: Alumni, 1998), pp. 177-196. See also Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia,* (Bandung: Binacipta, 1987), pp. 315-319. See Also Zulfa Djoko Basuki, Tiurma M.P. Allagan, et.al, *Hukum Perdata Internasional (Buku Materi Pokok/3SKS, Modul 1-9)* (Translation: Private International Law *(Material Book/3SKS, Module 1-9),* (Jakarta: Penerbit Universitas Terbuka, 2014), pp. 9.12.

[530] The Elucidation of Art. 11 of the Bill of 1997. *"(1) Ayat ini adalah sesuai dengan prinsip locus rigit actum atau lex loci celebrationis yang dianut oleh hukum Indonesia sampai saat diundangkannya Undang-undang ini (Pasal 18 AB, Stb. 1847:23). (2) Ayat ini adalah sesuai dengan prinsip lex rei sitae yang juga sudah dianut oleh hukum Indonesia sampai saat diundangkannya Undang-undang ini (Pasal 17 AB, Stb. 1847:23)."*

Nowadays, movable assets develop rapidly. Movable goods can be registered assets, such as intellectual property rights and their existence is represented by a certificate. There are also shares to represent the contribution of shareholders or stocks. It will be wise if the Bill of 2015 could be added with these matters or give any reference to any prevailing laws and regulation.

6.3.3 Family Matters in the Bill of 2015

Family matters are regulated in Chapter V of the Bill of 2015. Those articles cover the international mixed marriages, marital assets, divorce and annulment, relationship between parents and children, as well as guardianship. Adoption is stipulated in Chapter VI of the same. The author is still attached to the main topic of this writing, namely marriage establishment. Therefore, this sub-chapter will focus on marriage establishment, substantive requirements and marriage solemnization. Thus, other parts of the family law, marital assets, divorce, relationship between parents and children, as well as guardianship shall be mentioned in general. Divorce and adoption shall be excluded.

6.3.3.1 International mixed marriage

This paragraph specifically discusses marriage provisions in the Bill of 1997. An international mixed marriage is regulated in Art. 22-39 of Chapter V of the Bill of 1997. This paragraph will focus on the solemnization of international mixed marriage and mention the relevant articles on marriage.

6.3.3.1.1 Substantive Requirements

Substantive requirements in the Bill of 1997 are stipulated as follows, *"Pasal 22 (1) Syarat-syarat material perkawinan ditentukan oleh hukum nasional masing-masing pihak yang melangsungkan perkawinan. (2) Ketentuan ayat (1) berlaku sepanjang hukum nasional tempat perkawinan dilangsungkan tidak menentukan lain."* Translation: "Article 22 (1) Material requirements for a marriage shall be determined by the national law of each party who holds the marriage. (2) The provision of paragraph (1) shall apply insofar as the national law of place in which a marriage is held does not determine otherwise."

Consistent with the provisions of Art. 16 of AB and Art. 60 (1) of MA 1974, the provision above stipulates that substantive requirements for a marriage are determined by the national law of the marrying couple. This consistency shows that Indonesia and its PIL scholars are still according to the Principle of Nationality to determine the applicable law of a person.

An exception is made if the national law of country where the marriage takes place does not state otherwise. This exception distinguishes those provision from MA 1974. Those

provisions in conjunction with *renvoi* as referred to in Art. 3 of the Bill of 1997 give a chance for Indonesian laws to apply in case of single *renvoi* or refer-back, or for a foreign law to apply in case of transmission to another foreign law.

Reference to the national law can find another situation, for instance, dual or multi-nationality or even a stateless person. In the event of dual nationality or multi-nationality, according to Art. 5 of the Bill of 1997, the effective and active national law shall apply. In the event of a stateless person, according to Art. 6 of the Bill of 1997, the applicable law shall be the law of country where the person has his/her habitual residence. In this case, the author sees that the Bill consistently determine the applicable law of a person according to his/her national law. However, the Bill provides a chance to a foreign law to apply, if such law should be considered as the law which has the closest connection because of the forum.

MA 1974 states none of those circumstances and it only states the applicable law of a person. Art. 60 (1) of MA 1974 states "*Perkawinan campuran tidak dapat dilangsungkan sebelum terbukti bahwa syarat-syarat perkawinan yang ditentukan oleh hukum yang berlaku bagi pihak masing-masing telah dipenuhi.*" Translation: "A mixed marriage may not be held before it is proven that the requirements for a marriage determined by the laws applicable to each party have been met."

An exception is made not for *renvoi* or the local law of country where the marriage takes place, but when the authorized officer (of the foreign state) does not provide the required

statement letter.[531] The respective party can ask an Indonesian court for substitution.[532] In relation to this, the author supports the provision of the Bill of 1997.

6.3.3.1.2 Solemnization of International Mixed Marriage

The Bill of Indonesian PIL of 1997 states that

> "*Pasal 23 (1) Perkawinan adalah sah apabila dilangsungkan sesuai dengan syarat-syarat formal yang ditentukan oleh hukum negara tempat perkawinan dilakukan. (2) Perkawinan antara: (a) warga negara Indonesia dan warga negara Indonesia; dan (b) warga negara Indonesia dan warga negara asing; yang dilangsungkan di luar negeri adalah sah jika memenuhi syarat-syarat formal yang ditentukan oleh hukum Indonesia. (2) Perkawinan antara: (a) warga negara Indonesia dan warga negara asing; dan (b) warga negara asing dan warga negara asing, yang dilangsungkan di Indonesia adalah sah jika memenuhi syarat-syarat formal yang ditentukan oleh hukum Indonesia.*"

Translation: "(1) A marriage shall be valid in the event that it is held in accordance with the formal requirements determined by the law of country where the marriage is conducted. (2) A marriage between: (a) an Indonesian citizen and Indonesian citizen; and (b) an Indonesian citizen and foreign citizen; which is held abroad shall be valid if it meets the formal requirements determined by the Indonesian law. (2) A marriage between: (a) an Indonesian citizen and foreign citizen; and (b) a foreign citizen and foreign citizen; which is held in Indonesia shall be valid if it meets the formal requirements determined by the Indonesian law."

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[531] For ease of reference, Art. 60 of MA 1974 is (again) presented here. 60 (2) of MA 1974. "*Untuk membuktikan bahwa syarat-syarat tersebut dalam ayat (1) telah dipenuhi dan karena itu tidak ada rintangan untuk melangsungkan perkawinan campuran, maka oleh mereka yang menurut hukum yang berlaku bagi pihak masing-masing berwenang mencatat perkawinan, diberikan surat keterangan bahwa syarat-syarat telah dipenuhi.* (3) *Jika pejabat yang bersangkutan menolak untuk memberikan surat keterangan itu, maka atas permintaan yang berkepentingan, Pengadilan memberikan keputusan dengan tidak beracara serta tidak boleh dimintakan banding lagi tentang soal apakah penolakan pemberian surat keterangan itu beralasan atau tidak*. (4) *Jika Pengadilan memutuskan bahwa penolakan tidak beralasan keputusan itu menjadi surat pengganti keterangan yang tersebut ayat 3.* (5) *Surat keterangan atau keputusan pengganti keterangan tidak mempunyai kekuatan lagi jika perkawinan itu tidak dilangsungkan dalam masa enam bulan sesudah keterangan itu diberikan.*" Translation: (2) To prove that the requirements referred to in paragraph (1) have been met and therefore, there is no objection to solemnize a mixed marriage, those who according to the law applicable to each party are authorized to register a marriage a statement letter shall give a statement that the requirements have been met. (3) In the event that the officer concerned refuses to issue the statement letter, upon request of the interested party, a Court shall give a decision without any procedure and un-appealable in respect of the question whether or not the refusal of provision of the statement letter is reasonable. (4) If a Court decides that the refusal is unreasonable, such decision shall be a letter in lieu of the statement referred to in paragraph 3. (5) A statement letter or decision in lieu of statement shall not have any power if a marriage is held within six months following the provision of such statement.

[532] *Ibid*.

Art. 18 of AB and Art. 56 (1) of MA 1974 as well as Art. 23 (1) of the Bill of 1997 stipulate that marriage solemnization must take place according to the solemnization procedure pursuant to the law of country where the marriage takes place. All of those laws and the Bill make similar regulation pursuant to the principle of PIL, *lex loci celebrationis,* and the national law as the applicable law. In relation to this, it seems that Indonesian regulations and its PIL scholar have similar opinions.

MA 1974 and the Bill of 1997 detail its scope of international mixed marriage. MA 1974 stipulates two types of marriage with foreign elements. First, a mixed marriage is a marriage in Indonesia between a couple who are subject to different laws, arising from different nationalities, one of whom is an Indonesian.[533] Second, a marriage concluded abroad between a couple one of whom is an Indonesian citizen.[534] MA 1974 is silent about a marriage between foreign citizens in Indonesia. At the moment, the provisions on such marriage can be found in the Civil Administration Law, which states that marriage registration can be made with an Indonesian Vital Records Office if the couple wish to do so.[535] With respect to how the marriage can be solemnized, the Civil Administration Law mentions in its official elucidation that a marriage should be according to the Indonesian law.[536] In this respect, the Bill of 1997 covers marriages more completely. It covers the two marriages as referred to in MA 1974, in addition to the marriage between foreign citizens which is held in Indonesia.

In relation to the limitation, each MA 1974 and the Bill of 1997 stipulates differently. MA 1974 states that a marriage is valid if it is solemnized according to the local law in

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[533] Art. 57 of MA 1974. "*Yang dimaksud dengan perkawinan campuran dalam Undang-undang ini ialah perkawinan antara dua orang yang di Indonesia tunduk pada hukum yang berlainan, karena perbedaan kewarganegaraan dan salah satu pihak berkewarganegaraan Asing dan salah satu pihak berkewarganegaraan Indonesia.*"

[534] Art. 56 (1) of MA 1974. "*Perkawinan yang dilangsungkan di luar Indonesia antara dua orang warga negara Indonesia atau seorang warga negara Indonesia dengan warga negara Indonesia dengan warga negara Asing adalah sah bilamana dilakukan menurut hukum yang berlaku di negara di mana perkawinan itu dilangsungkan dan bagi warga negara Indonesia tidak melanggar ketentuan-ketentuan Undang-undang ini.*" Translation: A marriage solemnized outside Indonesia between two Indonesian citizens or one Indonesian citizen and a foreigner shall be valid if it is solemnized according to the law applicable in the Country where the marriage takes place and for Indonesian citizens, it does not violate the provisions of this Law."

[535] Art. 35 of the Civil Administration Law. "*Pencatatan Perkawinan sebagaimana dimaksud dalam Pasal 34 berlaku pula bagi: (a) perkawinan yang ditetapkan oleh Pengadilan; dan (b) perkawinan Warga Negara Asing yang dilakukan di Indonesia atas permintaan Warga Negara Asing yang bersangkutan.*" Translation: Marriage registration as referred to in the Article 34 shall also apply to: (a) marriage stipulated by a Court; and (b) marriage of a Foreign Citizen held in Indonesia at the request of the Foreigner concerned.

[536] Official elucidation of Art. 35 sub-article (b) of the Civil Administration Law. *"Huruf b. Perkawinan yang dilakukan oleh warga negara asing di Indonesia, harus mengikuti ketentuan peraturan perundang-undangan mengenai perkawinan di Indonesia."* Translation: sub-article b. A marriage hold by a foreigner in Indonesia, must comply with the provisions of laws and regulations on marriage in Indonesia.

line with the principle of *lex loci celebrationis*, and it cannot contradict the provisions stated in MA 1974.[537] The Bill of 1997 stipulates limitation in Art. 23 paragraph (2). It states that a marriage solemnized outside the territory of Indonesia involving an Indonesian citizen must consider the formal requirements determined by the Indonesian laws and regulations. This provision is slightly peculiar. First, such marriage is held abroad, and if formality must be according to the Indonesian laws, it is not in line with the principle of *lex loci celebrationis* as referred to in the first paragraph. The fact that one or both of the couple is/are Indonesian citizen(s) does not become the basis to conclude that Indonesian laws must apply. The Bill of Indonesian PIL of 1997 should consider whether or not the most connected law in this particular case is the Indonesian law. If the Indonesian law is the most connected law, for instance, the couple incidentally solemnized their marriage while in a vacation abroad, then the provision stating that Indonesian formality applies, is acceptable. However, if the Indonesian law is not the most connected law, this provision is arguable. Therefore, this provision must be understood in line with its elucidation whereby it refers only to the substantive requirements.[538]

6.3.3.2 Legal Consequences of International Mixed Marriage

The discussion on legal consequences of marriage herein shall follow the sequence of discussion in the previous sub-chapter for ease of comparison. It covers the relationship between a husband and wife including nationality, status of children and marital assets.

6.3.3.2.1 Nationality of Spouses and Children

The Bill of 1997 is silent about the nationality of spouses and children, but it stipulates the applicable laws of the marriage, and consequences after a change of nationality subsequent to a marriage, relevant with the scope of PIL.

Art. 24 of the Bill of 1997 states that *"Hubungan hukum personal antara suami istri ditentukan oleh hukum nasional suami."* Translation: "Personal legal relationship between a husband and wife shall be determined by the national law of the husband." The personal legal relationship between a husband and wife in this context refers to the rights and obligations between them as stipulated in the marriage law. For instance, the

[537] MA 1974: "*…tidak melanggar ketentuan-ketentuan Undang-undang ini."* MA 1974: "…not contradict the provisions of this Law."

[538] Elucidation of Art. 23 (2) of the Bill of 1997.

obligation of the husband and wife to fulfill their noble obligations jointly in order to maintain their household, love, respect and support each other.[539]

Art. 25 of the Bill of 1997 states that:

> *"(1) Apabila setelah perkawinan dilangsungkan, suami istri kedua-duanya memperoleh kewarganegaraan lain dari kewarganegaraan yang dimiliki pada saat perkawinan dilangsungkan, dan kewarganegaraan yang baru diperolehnya itu sama bagi suami dan istri, akibat-akibat hukum dari perkawinan mereka tidak berubah, sepanjang menyangkut hal-hal yang terjadi sebelum terjadi perubahan kewarganegaraan. (2) Apabila setelah perkawinan dilangsungkan, salah seorang, entah suami entah istri, memperoleh kewarganegaraan yang lain daripada kewarganegaraan yang dimilikinya pada saat perkawinan dilangsungkan, akibat-akibat dari perkawinan mereka tidak berubah."*

Translation: (1) In the event that after a marriage is held, both husband and wife acquire a nationality other than the nationality possessed at the time of marriage, and the newly acquired nationality is the same for the husband and wife, legal consequences of their marriages shall not change, insofar as related to matters which occur before the change of nationality. (2) In the event that after a marriage is held, one of them, either the husband or wife, acquires a nationality other than the nationality possessed by him/her at the time of marriage, legal consequences of their marriage shall not change."

Art. 24 of the Bill of 1997 was drafted in the spirit of "one law in one family". In addition, it follows the most traditional system, patrilineal pattern. Due to the development of opinions and also gender equality as mentioned in CEDAW, the applicable law in relation to a husband and wife should alternatively be the law having a connecting factor which is common for both spouses, for instance the matrimonial domicile of the couple. This provision should be looking for the most connected law of a husband and wife, while at the same time, reflecting the gender equality between them.

Art. 25 of the Bill of 1997 is about the applicable law of a couple who change their nationality and its effectiveness. The change of nationality of both husband and wife will cause a change of their applicable law. The new applicable law shall only apply to matters which occur after the change of their nationality, and does not affect preceding matters. The second paragraph stipulates that if one of the couples changes his/her nationality, the applicable law shall only apply to the person concerned, and it shall not affect the other spouse. This stipulation is reasonable, as it will be peculiar for the spouse when he/she does nothing, yet his or her marriage is subject to a foreign law. It will be

[539] Art. 31-34 of MA 1974 regarding rights and obligation of a husband and wife. A husband and wife must cooperatively build their family and household. They have to have a joint permanent residence, etc. See the description of rights and obligations of a husband and wife in Sub-chapter 2.2.6.1.

odder if he or she is unfamiliar with the law or does not desire it.[540] An exception occurs if the change of nationality results in the same nationality between the husband and wife. This is the expected situation because it is in line with the spirit of "one law in one family". In this event, the provision of paragraph (1) shall be applied. Those provisions need also to consider the mobility of the spouses within an open society such as ASEAN. Therefore, it is advisable to consider the close connection factor which is common for both spouses in determining the applicable law in addition to the national law of the spouses.

6.3.3.2.2 Children of International Mixed Marriages

The position of children is stipulated in Art. 33-35 of the Bill of 1997. In relation to children of a mixed marriage, the Bill of 1997 mentions about the applicable law of children legitimation (Art. 33, 35), and the relationship between parents and children (Art. 34). It states that:

> *"Pasal 33 (1) Sah tidaknya seorang anak diatur oleh hukum nasional dari suami dari ibu anak yang bersangkutan pada saat anak itu dilahirkan. (2) Apabila pada saat anak dilahirkan, suami tersebut telah meninggal dunia, sah tidaknya anak tersebut ditentukan oleh hukum nasional suami tersebut pada saat ia meninggal. (3) Hukum nasional suami tersebut berlaku pula bagi gugatan tentang penyangkalan sah tidaknya seorang anak.*
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> *Pasal 34 (1) Hak dan kewajiban antara orang tua dan anak sah tunduk pada hukum nasional ayah. (2) Apabila seorang anak dilahirkan dari seorang wanita yang tidak menikah, hak dan kewajiban antara ibu dan anak tunduk pada hukum nasional dari wanita tersebut.*
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> *Pasal 35 (1) Pengesahan anak tunduk pada hukum nasional ayah pada saat pengesahan dilakukan. (2) Apabila pada saat itu ayah tersebut telah meninggal, hukum yang berlaku adalah hukum nasional dari ayah pada saat ia meninggal."*

Translation: "Art. 33 (1) The legitimacy of a child shall be regulated by the national law of husband of the mother of the child concerned when the child is born. (2) If when a child is born, the husband has passed away, the legitimacy of such child shall be determined by the national law of such husband when he passes away. (3) The national law of husband shall also apply to a claim for denial of the legitimacy of a child. Art. 34 (1) The rights and obligations between parents and legitimate children shall be subject to the national law of the father. If a child is born from an unmarried woman, the rights and obligations between the mother and child shall be subject to the national law of the woman. Art. 35 (1) The legitimacy of a child shall be subject to the national law of the father when such legitimacy is made. (2) If when the legitimacy is made, the

[540] The elucidation of Art. 25 of the Bill of 1997.

father has passed away, the applicable law shall be the national of the father when he passes away."

The legitimacy of a child is subject to the national law of his father, the legal husband of his/her mother. In the event that his father has passed away when he/she was born, the applicable law is the national law when his father passed away. The national law of the father also applies to denial of the child's legitimacy. The rights and obligations between parents and legitimate children are subject to the national law of the father. The child of an unmarried woman is subject to the national law of his mother. Those stipulations are in line with the principle of *parens dat statutum*.[541]

The provision was formed in the spirit of union of law in the family *(kesatuan hukum dalam keluarga)*. It is in line with the previous Indonesian Nationality Law which adopts such concept.[542] Bearing in mind the development of PIL on children and consistency with other provisions, it is advisable if those provisions consider the principles "the best interest of the child" and the close connection factor which is common to the family in determining the applicable law in addition to the national law of the father.

6.3.3.2.3 Marital Assets and Marital Agreement

Marital assets and marital agreement of international mixed marriage are stipulated in Art. 26-29 of the Bill of 1997. It states that:

> *"Pasal 26. Hukum Harta Benda Perkawinan antara suami istri yang berkewarganegaraan sama diatur oleh hukum nasional mereka pada saat perkawinan dilangsungkan. (2) Apabila berdasarkan hukum nasionalnya suami istri dapat mengadakan perjanjian perkawinan, ketentuan mengenai harta benda mereka tunduk pada perjanjian tersebut dan harus memenuhi syarat-syarat yang ditentukan oleh hukum nasional mereka.*
>
> *Pasal 27 (1) Harta benda perkawinan antara suami istri yang berbeda kewarganegaraan diatur oleh hukum yang dipilih oleh para pihak. (2) Hukum yang*

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[541] Elucidation of Art. 33 and 34 of the Bill of 1997. *"Penjelasan Pasal 33. Untuk hubungan orang tua dan anak, dipergunakan prinsip nasionalitas. Hukum suami dari ibu anak yang bersangkutan dianggap menentukan dalam hal ini. Ketentuan tersebut adalah sesuai dengan asas* parens dat statutum*. Penjelasan Pasal 34. Dalam perkawinan yang sah, hak dan kewajiban orang tua terhadap anak, dan sebaliknya, diatur oleh hukum nasional ayah. Jika anak yang bersangkutan adalah anak tidak sah, karena orang tua mereka tidak dalam hubungan perkawinan, maka hak dan kewajiban antara ibu dan anak diatur oleh hukum nasional ibu tersebut. Hal ini adalah penerapan lebih jauh dari asas* parens dat statutum*."*

[542] Sudargo Gautama, *Hukum Perdata Internasional Indonesia Jilid III Bagian I, Buku ke-7* (translation: Indonesian Private International Law, Volume III Part I, the 7th Book), 3rd revised Ed. (Bandung: Penerbit Alumni, 2010), pp. 89-91. In this book, Sudargo Gautama is aware of the development and tendency that the applicable law of children shall also considers the welfare or interest of the children. This suggestion is further developed by Zulfa Djoko Basuki in her dissertation. In one of the recommendations, she suggests that the applicable law with regards to children custody is the law of country where the children have their habitual residence. See Djoko Basuki, *Dampak Perkawinan Campuran terhadap Perwalian Anak (Child Custody), Loc. Cit.,* p. 258.

dipilih oleh para pihak ialah: (a) Hukum nasional suami atau istri pada saat pilihan hukum dilakukan; (b) Hukum negara yang merupakan tempat kediaman sehari-hari suami atau istri pada saat pilihan hukum dilakukan; atau (c) Hukum dari negara yang merupakan tempat kediaman biasa sehari-hari pertama suami dan istri setelah perkawinan dilangsungkan. (3) Apabila para pihak tidak mengadakan pilihan hukum, hukum yang berlaku adalah hukum intern dari negara yang merupakan tempat kediaman sehari-hari pertama dari suami istri.

Pasal 28 Apabila perjanjian perkawinan tersebut berkenaan dengan benda tak bergerak, hukum yang berlaku adalah hukum negara tempat benda tersebut terletak.

Pasal 29 (1) Apabila dalam suatu perkawinan diadakan perjanjian perkawinan mengenai harta benda, kemampuan hukum untuk mengadakan perjanjian bersangkutan diatur oleh hukum nasional masing-masing pihak. (2) Bagi suami istri yang mempunyai kewarganegaraan yang sama, syarat-syarat materiil dan akibat hukum dari perjanjian perkawinan itu diatur oleh hukum nasional mereka. (3) Bagi suami istri mempunyai yang berkewarganegaraan yang berbeda, syarat-syarat materiil dan akibat hukum dari perjanjian perkawinan itu diatur oleh hukum yang mereka pilih. Dalam hal ini tidak ada pilihan hukum, yang berlaku adalah hukum dari tempat kediaman sehari-hari pertama suami istri."

Translation: Art. 26 (1) The Law of Marital Assets of a husband and wife who have the same nationality shall be provided for by their national law at the time of marriage. (2) In the event that based on their national law, a husband and wife may enter into a marital agreement, provisions on their marital assets shall be subject to such agreement and must meet the requirements determined by their national law.
Art. 27 (1) Marital assets of a husband and wife who have a different nationality, shall be provided for by the law chosen by the parties. (2) The law chosen by the parties shall be: (a) The national law of the husband or wife at the time the choice of law is made; (b) The law of state constituting the habitual residence of the husband or wife at the time the choice of law is made; (c) The law of state constituting the first habitual residence of the husband and wife after the marriage. (3) In the event that the parties do not make any choice of law, the applicable law shall be the intern law of the state constituting the first habitual residence of the husband and wife. Art. 28 In the event that the marital agreement is related to immovable assets, the applicable law shall be the law of state in which the assets are located. Art. 29 (1) In the event that in a marriage, a marital agreement on assets is entered into, the legal capacity to enter into the agreement concerned shall be provided for by the national law of each party. (2) For a husband and wife who have the same nationality, the material requirements and legal consequences of the marital agreement shall be provided for by their national law. (3) For a husband and wife who have a different nationality, the material requirements and legal consequences of the marital agreement shall be provided for by the law chosen by them. In the event of no choice of law, the applicable law shall be the law of the first habitual residence of the husband and wife.

These provisions cover *harta bawaan*, joint marital assets, and separated assets. Marital assets of a couple who have the same nationality are subject to their national law. A husband and wife have the possibility for entering into a marital agreement if their national law allow them to do so. In such case, they are able to determine the marital agreement according to their consent provided that the provisions are according to the national law. In other words, their agreement must be in line with the requirements and provisions of their national law.[543]

A couple who have concluded a mixed marriage and have a different nationality have the possibility for making a choice of law in their marital agreement. However, the choice of law is limited. They cannot choose any law as they please, but is limited to one of their national law, the law of the state where they have their habitual residence when the choice of law is made, or the law of the state where they have their habitual residence after their marriage. The marital agreement shall cover the whole assets of both parties, but this marital agreement is also limited to the principle of *lex re sitae*.[544] In respect of marital agreement, the capacity of a person is subject to the national law of the respective party and is independent from the choice of law.[545]

6.3.3.3 Annulment of Marriage

Annulment of marriage is stipulated in Art. 32 of the Bill of 1997. It stipulates that:

> *"(1) Pembatalan perkawinan ditentukan oleh hukum yang mengatur syarat-syarat material perkawinan tersebut. (2) Apabila yang dipergunakan sebagai alasan untuk pembatalan perkawinan itu adalah kekeliruan, penipuan dan paksaan, hukum yang berlaku adalah hukum dari tempat perkawinan dilangsungkan.*"

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[543] Elucidation of Art. 26 (1) of the Bill of 1997. *"(1) Yang dimaksud dengan Hukum Harta Benda Perkawinan ialah semua ketentuan hukum mengenai harta benda suami istri, baik yang mengenai harta bersama, harta bawaan maupun harta terpisah. Dalam hal suami istri berkewargenegaraan sama, maka akan dipakai hukum nasional mereka. (2) Hukum nasional menentukan apakah antara suami istri dapat diadakan perjanjian mengenai harta benda perkawinan mereka. Apabila hal tersebut dimungkinkan, maka yang berlaku adalah kehendak para pihak sendiri dalam perjanjian perkawinan tersebut, yang harus memenuhi syarat-syarat yang ditentukan oleh hukum nasional mereka."*

[544] Elucidation of Art. 27 and 28 of the Bill of 1997. *"Pasal 27. (1) Kepada suami istri diberi kesempatan untuk melakukan pilihan hukum secara terbatas. Terbatas tersebut, yaitu sebagaimana ditentukan dalam ayat (2). (2) Ayat ini menentukan batas-batas di dalam mana suami istri dapat melakukan pilihan hukum tersebut. Hukum yang dipilih itu berlaku atas seluruh harta benda mereka. (3) Menurut pandangan terbaru para sarjana di bidang Hukum Perdata Internasional, apabila suami istri tidak mengadakan pilihan hukum, maka yang berlaku adalah hukum tempat kediaman pertama setelah perkawinan dilangsungkan (first matrimonial domicile). Pasal 28. Walaupun suami istri telah mengadakan pilihan hukum sesuai dengan Pasal 27 ayat (2), akan tetapi terhadap benda tak bergerak berlaku hukum dari tempat benda itu."*

[545] Elucidation of Art. 29 of the Bill of 1997. *"Pasal ini mengatur lebih lanjut soal kemampuan untuk mengadakan perjanjian perkawinan yang dianggap termasuk bidang status personal seseorang."*

Translation: (1) The annulment of a marriage shall be determined by the law which provide for the material requirements of such marriage. (2) In the event that error, fraud or coercion is used as a reason for the annulment of marriage, the applicable law shall be the law of place where the marriage takes place.[546]

The provisions of marriage above in the Bill of 1997 are consistent with the principle of Indonesian PIL, as well as MA 1974. Moreover, the provisions on international mixed marriage are more detailed compared to MA 1974. These provisions deserve to be preserved in the next bill of Indonesian PIL (which will be discussed in Chapter 7). Notwithstanding that certain provisions need adjustment due to the current Indonesian condition, the development of PIL and comparison will be discussed in the next chapter.

7 Notes and Conclusions

7.1 Mixed marriage in MA 1974

International mixed marriage and interfaith mixed marriage still exist in Indonesia, while inter-regional mixed marriage and inter-*Adat* mixed marriage are no longer valid in Indonesia after the promulgation of MA 1974 at the national level.

MA 1974 provides the provisions of international mixed marriage in Art. 57. Those provisions are in line with the principles of Indonesian PIL. In relation to the substantive requirements, it applies the Principle of Nationality according to Art. 16 of AB. In relation to the solemnization of marriage, it applies the principle of *lex loci celebrationis*, provided that such international mixed marriage is according to MA 1974.

MA 1974 also provides the provisions of a marriage solemnized abroad, either between Indonesian citizens or an Indonesian citizen and a foreigner. In relation to the solemnization of marriage, it applies the principle of *lex loci celebrationis.* The marriage is recognized as valid if it does not contradict the Indonesian public policy. In addition, the couple must make marriage registration within 6 months as of their return to Indonesia with a local registration office. Any delay to this marriage registration will cause a fine as administrative penalty.

MA 1974 recognises an interfaith mixed marriage, as a marriage between a couple who are subject to different religion law, as described in Art. 57 *jo* Art. 2 of MA 1974. However, MA 1974 is silent about the solemnization of interfaith mixed marriage.

[546] Elucidation of Art. 32 of the Bill of 1997. *"Dianggap perlu untuk mengadakan pembedaan mengenai hukum yang berlaku untuk pembatalan perkawinan, karena syarat-syarat materiil perkawinan belum terpenuhi dan karena kekeliruan, penipuan atau paksaan. Untuk kekeliruan, penipuan atau paksaan berlaku asas* lex loci celebrationis."

Several approaches are made, yet each approach has its doubt and legal question. The Civil Administration Law stipulates that an interfaith mixed marriage can be registered as a marriage determined by a district court. It needs clarification and to be frank, it needs regulation.

7.2 Marriage Registration

MA 1974 states in Art. 2 that a marriage shall be valid if it is solemnized according to the religion law. Marriage solemnization shall be followed by marriage registration with the authorized Vital Records Office.

The marriage is valid if it is solemnized according to the matrimonial ceremony pursuant to the religion law. After the matrimonial ceremony, the marriage must be registered with a Vital Records Office. There is no marriage without any registration, and no registration without matrimonial ceremony. Marriage Certificate is the *prima facie* of marriage.

In particular cases, there are some marriages solemnized according to the matrimonial ceremony, yet without any registration. The courts acknowledged the existence of those marriages. The author would like to take a note from these cases that those marriages were acknowledged because judges considered the good will of the respective couple by showing their attitude as a married couple until one of them passed away. In addition, at the time of marriage, both couples are eligible to marry according to MA 1974.

After the promulgation of the Civil Administration Law, marriage registration is for an administrative purpose. In relation to a marriage, a registration officer registers a marriage as per request of a couple. The officer has no task to solemnize the marriage, for it is the task of *penghulu,* pastor or any other authorized religious officers. The officer also registers the marriage solemnized abroad, which in fact are mostly interfaith mixed marriages. This registration by the Vital Records Office is a silent recognition to interfaith mixed marriage, because in the end, a marriage certificate issued by the registry office becomes *prima facie* which has full legal power as the evidence of the marriage.

In a legal pluralistic society like Indonesia, an interfaith mixed marriage cannot be avoided. This phenomenon should be accepted, moreover the proceeding of interfaith mixed marriage before the Constitutional Supreme Court shows that religions in Indonesia do not totally prohibit an interfaith mixed marriage. Religious leaders state that it is not an ideal marriage, yet the possibility exists. Therefore, procedure for the solemnization of this marriage should be provided, just like any other marriages. The equality between religions, as reflected in Art. 2 of GHR and consideration to protect children can be the starting points.

7.3 Nationality of Domicile or Nationality of Habitual Residence?

Amendment to the Principle of Nationality was supported by Sudargo Gautama and Zulfa Djoko Basuki, both of whom presented the view and discussion on the Principle of Domicile. At that time, Sudargo Gautama has proposed his opinion to Indonesia to shift and adopt the domicile law, although he would not negate the application of national law in Indonesia's system.[547] In addition, he mentioned that the application of the Principle of Nationality should be restrained in order to avoid a rigid implementation which leads to *"juridisch chauvinisme"*.

He proposed that the principle of nationality still applies to foreigners who live in Indonesia for less than two years. After that period of time, the law of Indonesia where foreigners have their domicile will apply. The period of two years refers to the period stated in the immigration regulation on the Permit to Enter Indonesia at that time.[548] Zulfa Djoko Basuki, one of his apprentices in PIL, had the same opinion. However, he mentioned ten years instead of two years.

The background of switching proposal from those scholars among others is for practical reason. The use of domicile law may minimize the application of a foreign law before a court because its reference will mostly go to the *lex fori*, while the principle of nationality will lead more to the application of the foreign law.[549] There was also a concern that the application of a foreign law may lead to a fallacious application due to the lack of legal writings or experts of the law concerned in Indonesia. In addition, the application of domicile law will facilitate the assimilation process; moreover, the geographical position of Indonesia is surrounded by countries which employ the same principle.

This question becomes more important when Indonesia amended the law of Indonesian nationality, from the Principle of one absolute nationality of a person to a limited dual nationality *(Prinsip Kewarganegaraan Ganda Terbatas).* Dual nationality of children of international mixed marriage raises PIL problem: what is the applicable law to the children?

The author is of the opinion that the applicable law in those situations shall be determined by the national law of the respective persons. Moreover, the national law is supported by the most connected law, which in this situation, is often stated as the real

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[547] Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia* (translation: Introduction to Indonesian Private International Law) (Jakarta: Binacipta, 1987), p. 87.

[548] *Ibid*.

[549] *Ibid*, pp. 85-87.

and effective nationality. A real and effective nationality can be concluded from the daily life or habitual residence of the relevant family and/or children, social facts i.e. residence, centre of interest, family relationship, participation of social and state life, bound or attached feeling to a particular country.

From the above matters, the Principle of Nationality needs the assistance of another instrument to determine the applicable law of a person. In a dual nationality, the tool is the effective and active nationality. In divorce, the tool is the matrimonial domicile. They show that the presumption to choose the applicable law after the prime principle of national law is the close connection. The author supports this consideration because this thought shows the real connection and center of gravity of the person in his or her surroundings.

7.4 Bill of 1997

The Bill of 1997 was proposed to replace PIL's three skeleton keys of Indonesia contained in Articles 16, 17, 18 of AB. The influence of globalization, and nowadays, regional cooperation in ASEAN, as well as the ease in making contact and relationship with someone or any third parties outside the territory of Indonesia are some of the main reasons for the current bill. In order to legislate on the cross-border activities of Indonesian citizens, the Bill of 1997 was created to provide protection and legal certainty for Indonesian citizens whose activities involve foreign elements.

PIL rules in Indonesia are spread out and scattered amongst other laws and regulations enacted afterwards, for instance the Investment Law, or intellectual property right law. Some principles are reflected in the decisions of the Supreme Court which have become landmark decisions and provoke further discussions amongst scholars. Therefore, the aspiration to codify PIL rules in one law is highly relevant and important for Indonesia. However, since PIL provisions are scattered in the prevailing regulations, for instance MA 1974, it is necessary to consider them to avoid any contradiction among provisions.

The Bill of 1997 is still open to advice, comments and amendments. Before it is promulgated, it is important to see whether or not this Bill fits and meets the need of Indonesians nowadays, in particular, the establishment of marriage at the ASEAN level. Therefore, a comparison to see the possibility through the relevant regulation is made in the next two chapters.

Chapter 4
ASEAN One Community

1 General Overview of ASEAN

The Association of Southeast Asian Nations, abbreviated to the "**ASEAN**", was created on August 8, 1967 in Bangkok, with five original Member Countries, i.e., Indonesia, Malaysia, the Philippines, Singapore and Thailand. Brunei Darussalam joined in 1984, followed by Vietnam in 1995, Lao PDR and Myanmar (Burma) in 1997 and last but not least, Cambodia in 1999.

ASEAN alliance membership is open to all states in the region of South East Asia. The ASEAN membership is voluntary in nature. The association embodies the communal will of the nations in Southeast Asia to bond together in friendship and cooperation, through joint efforts and sacrifices, in the name of peace, freedom, prosperity and future generation.[550]

This chapter attempts to analyze based on a normative approach whether or not it would be possible for ASEAN to have harmonization or unification in arranging marriage regulations and its recognition amongst the member states. It will also explain the challenges of creating the harmonization or unification of law within the ASEAN region.

1.1 History of ASEAN

ASEAN is the biggest regional association and the most reputable organization in the Asian region. It has played an important economic and political role worldwide, particularly for its member states.[551]

The background of ASEAN started side by side with the Cold War and the transition of independence of many Southeast Asian states. Before the establishment of ASEAN, South Asia had the Association of Southeast Asia (ASA) formed in 1961 in Thailand,

[550] ASEAN, *The Founding of ASEAN" Association of Southeast Asian Nations (ASEAN)*, available at ASEAN official website: http://asean.org/asean/about-asean/history/ last accessed on July 14, 2016.

[551] Kishore Mahbubani and Jeffery Sng, *ASEAN Miracle, A Catalyst for Peace,* (Singapore: US Press, 2017). In relation to the ASEAN reputation as the catalyst, this book states that ASEAN might receive a Noble Prize (see page 295). Due to ASEAN's successes, it proposes to tell more and provide the information on the ASEAN achievements. In relation to the maintenance of its great position as a catalyst, the authors of this book propose three actions, namely ASEAN needs to propagate the sense of ASEAN ownership within its society, to improve the ASEAN secretariat to a bigger and dynamic secretariat to serve ASEAN needs, to place ASEAN as a new lighthouse for humanity within the region of ASEAN. See also Tobias Ingo Nischalke, *Insight from ASEAN's Foreign Policy Cooperation: The "ASEAN Way", a real spirit or a phantom?,* published in Contemporary Southeast Asia, Vol. 22, No. 1, April 2000, p. 89.

Philippines and the Federation of Malaya under the initiative of Prime Minister Rahman of Malaya.[552] The war in Vietnam also encourages the association to more actively forming a new regional body encircling Indonesia and Singapore.

ASEAN was not established as a military or security organization. The primary objective of ASEAN at that time was fostering trust amongst member states. The five founder members declared that Southeast Asia should be a "zone of peace, freedom and neutrality, free from any form of interference by external power."[553]

There is ample debate whether or not ASEAN is a successful regional organization. ASEAN has played an important role based on the limited mandates outlined in its 1967 charter. ASEAN has reduced competition among its members and contributed to a more stable order in Southeast Asia. The growth of membership in the 1990s was meant to improve ASEAN's voice in international affairs by making the region more cohesive and to make Southeast Asia more appealing to invest in economically.[554] The expansion brought complex challenges. ASEAN added five countries in that decade and recognized that there was a chance to add other South Asian states.

The achievements of ASEAN since its establishment in 1967 are certainly impressive. In a region which was previously beset by confrontation, no armed conflict has erupted among the ASEAN members, although tension surfaced on several occasions. ASEAN has managed to attain a high profile and regional grouping has acted in concert in the economic as well as diplomatic spheres. These ASEAN achievements are indisputable.

1.2 Objectives and purposes of ASEAN

Initially, ASEAN's objectives and purposes were stated in the ASEAN Declaration in Bangkok in 1967. It was declared as follows:[555]

1. *"To accelerate the economic growth, social progress and cultural development in the region through joint endeavors in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of South-East Asian Nations;*

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[552] *Ibid.*

[553] Water Woon, *The ASEAN Charter, A Commentary,* (Singapore: NUS Press, 2016), pp. 3-4. Complete timeline of the establishment of ASEAN is described properly in its sub-chapter of Introduction regarding "A Short History of ASEAN". See also Jean-Claude Piris and Water Woon, *Towards a Rules-Based Community: An ASEAN Legal Service,* (Cambridge: Cambridge University Press, 2014), pp. 1-64. It provides the timeline of ASEAN and the development from Bangkok Declaration of 1967 to ASEAN Charter of 2007.

[554] Logan Masilamani and Jimmy Peterson, *The "ASEAN Way": The Structural Underpinnings of Constructive Engagement,* issued Foreign Policy Journal, October 15, 2015, p. 2.

[555] ASEAN, "The ASEAN Declaration (Bangkok Declaration) 1967", available at ASEAN website: http://asean.org/asean/about-asean/, last accessed on June 14, 2016.

2. *To promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter;*
3. *To promote active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields;*
4. *To provide assistance to each other in the form of training and research facilities in the educational, professional, technical and administrative spheres;*
5. *To collaborate more effectively for the greater utilization of their agriculture and industries, the expansion of their trade, including the study of the problems of international commodity trade, the improvement of their transportation and communications facilities and the raising of the living standards of their peoples;*
6. *To promote South-East Asian studies;*
7. *To maintain close and beneficial cooperation with existing international and regional organizations with similar aims and purposes, and explore all avenues for even closer cooperation among themselves."*

These objectives and purposes have been drafted on the existence of mutual interests and common problems among member countries, and the need to further strengthen the bond of regional solidarity and cooperation. To achieve these objectives and purposes, a standing committee as well as the Ad-hoc and Permanent Committees of specialists and officials on specific subjects were needed. Permanent Secretariat was established in February 1976 to support the work of ASEAN, due to the increasing demands of ASEAN members for a central administrative organ to provide the efficiency in the coordination of ASEAN's projects and activities. This establishment was seen as one of the milestones of ASEAN evolution.[556] Although members have not given any real decision-making powers to the Secretariat, the evolution of the Secretariat indicated the maturation of ASEAN as an entity. It is also considered as the formalization of legal personality of ASEAN as a corporate entity governed by its own constitution and by-laws.[557]

Since its establishment, several meetings and declarations were made to strengthen the ASEAN cooperation. One of the important events is the ASEAN Charter which took place on November 20, 2007 and was effective as of December 15, 2008. This charter provides a legal framework for ASEAN, legal personality,[558] establish wider

[556] Paul J. Davidson, *The ASEAN Way and the role of law in ASEAN Economic Cooperation,* in the *2004 Singapore Year Book of International Law and Contributors,* p. 169.

[557] *Ibid.*

[558] Chapter II, Art. 3 of the ASEAN Charter. *"Art. 3 Legal Personality of ASEAN. ASEAN, as an inter-governmental organization, is hereby conferred legal personality."* See further the comments and elaboration of the ASEAN legal personality, Water Woon, *The ASEAN Charter, A Commentary, Op.Cit.,* pp. 74-78.

cooperation amongst the ASEAN Member States, a mechanism to resolve the ASEAN resolutions,[559] and a firm commitment to establish the ASEAN National secretariats and a regional human right institution.[560]

One of the important declarations was the ASEAN Vision 2020, known as the "ASEAN Community". It was firstly adopted on December 15, 1997 in Kuala Lumpur by the leaders at the 30th Anniversary of ASEAN. The ASEAN vision on the region sees ASEAN as a concert of Southeast Asian Nations, out-looking, living in peace, striving for stability and prosperity, bonded together in partnership, in dynamic development, and in a community of caring societies. In this summit, the Treaty of Amity and Cooperation[561] became fully functional as a binding code of conduct for the governments and peoples, to which others interested states in the region adhere. After the ASEAN Vision 2020 was declared, in 2003 ASEAN leaders committed to what is known as the Bali Concord II.[562] It established three pillars to realize the ASEAN Vision 2020. In this summit, the term ASEAN Economic Community (AEC) was for the first time announced, and in addition to AEC, ASEAN Security Community (ASC) and ASEAN Socio-Cultural Community ASCC) constituted the other two integral pillars of the envisaged ASEAN Community.[563]

At the 12th ASEAN Summit, the Cebu Declaration 2007 was signed by the ASEAN Heads of State and/or Government Member Countries who affirmed to accelerate the establishment of the ASEAN Community by 2015.[564] The AEC as the second pillar of

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[559] Art. 8-10, Art. 12 of the ASEAN Charter. Based on these articles, ASEAN has organs, namely (1) the ASEAN Summit that shall comprise the Heads of States or Government of the Member States. It shall be the supreme policy-making body of ASEAN. (2) ASEAN Community Counsel that shall comprise the ASEAN Political-Security Community Council, ASEAN Economic Community Council, and ASEAN Socio-Cultural Community Council. Each ASEAN Community Council shall have under its purview the relevant (3) ASEAN Sectoral Ministerial Bodies. Besides those organs, ASEAN also has the Committee of Permanent Representative ("CPR"). CPR has task, among others to assist the preparation of meetings of the ASEAN Summits, coordinating the implementation of agreements and decisions of the ASEAN Summit. See Water Woon, *The ASEAN Charter, A Commentary, Op.Cit.,* pp. 128-134.

[560] Art. 13 and 14 of the ASEAN Charter. "13. ASEAN National Secretariats. Each ASEAN Member State shall establish an ASEAN National Secretariat which shall (a) serve as the national focal points; (b) ..... 14. ASEAN Human Rights Body. (1) In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body. (2) This ASEAN Human Rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting." See Water Woon, *The ASEAN Charter, A Commentary, Op. Cit.,* pp. 134-139.

[561] Treaty of Amity and Cooperation is the treaty of the ASEAN Member Countries that have adopted the pursuing fundamental principles in dealing with one another. It described in the Treaty of Amity and Cooperation in Southeast Asia (TAC), signed on 24 February 1976.

[562] "Declaration of ASEAN Concord II (Bali Concord II) 2003", available on official website of ASEAN at http://asean.org/?static_post=declaration-of-asean-concord-ii-bali-concord-ii-2 , last accessed on 14 July 2016.

[563] *Ibid.*

[564] "Cebu Declaration 2007", available on official website of ASEAN at http://asean.org/cebu-declaration-on-th-acceleration-of-the-establishment-of-an-asean-community-by-2015/ last accessed on 14 July 2016.

ASEAN Community shall be the ultimate goal of regional economic integration schemes. Some efforts related to the economic cooperation had been prepared before the setting up of AEC, such as the implementation of Hanoi Plan Action with the main purposes of consolidating and strengthening the economic fundamentals of the Member Countries.[565]

The latest work for implementing the ASEAN Community was described in the ASEAN vision 2025.[566] In this vision, the ASEAN Community by 2025 shall be highly integrated and cohesive, competitive, innovative and dynamic; with enhanced connectivity and sectoral cooperation; and a more resilient, inclusive, and people-oriented, people-centered community, integrated with the global community.

1.2.1 ASEAN Political-Security Community

The ASEAN Heads of State and/or Government Member States affirm that the ASEAN Political-Security Community (APSC) by 2025 shall be a united, inclusive and resilient community. People shall live in a safe harmonious and secure environment, embrace the values of tolerance and moderation as well as uphold ASEAN fundamental principles, shared values, and norms. ASEAN shall remain cohesive, responsive and relevant in addressing challenges to regional peace and security as well as play a central role in shaping the evolving regional architecture while deepening the engagement with external parties and contributing collectively to global peace, security, and stability.[567]

Therefore, ASEAN Member States undertake to realize:[568]

1. A rules-based community that fully adheres to ASEAN fundamental principles, shared values and norms as well as principles of international law governing the peaceful conduct of relations among states;
2. An inclusive and responsive community that ensures the people in ASEAN enjoy human rights and fundamental freedoms as well as thrive in a just, democratic, harmonious and gender-sensitive environment in accordance with the principle of democracy, good governance and the rule of law;
3. A community that embraces tolerance and moderation, fully respects the different religions, cultures and languages of people in ASEAN, upholds common values in the spirit of unity as well as addresses the threat of violent extremist in all of its forms and manifestations;

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[565] See Hanoi Plan of Action on 6th ASEAN Summit 1998, available on official website of ASEAN at http://asean.org/?static_post=hanoi-plan-of-action , last accessed on July 14, 2016.

[566] "ASEAN Vision 2025: Forgoing Ahead Together", available on official website of ASEAN at http://www.asean.org/storage/2015/12/ASEAN-2025-Forging-Ahead-Together-final.pdf , last accessed on July 14, 2016.

[567] *Ibid.*

[568] *Ibid.*

4. A community that adopts a comprehensive approach to security which enhances ASEAN capacity to address effectively and in a timely manner existing and emerging challenges, including non-traditional security issues, particularly transnational crimes and transboundary challenges;
5. A region that resolves differences and disputes by amicable means, including refraining from threat or use of force and adopting an amicable dispute settlement mechanism while strengthening confidence-building measures promoting preventive diplomacy activities and conflict resolution initiatives;
6. A region that remains free of nuclear weapon and other weapons of mass destruction, as well as contributes to global efforts on disarmament, non-proliferation and peaceful uses of nuclear energy;
7. A community that enhances maritime security and maritime cooperation for peace and stability in the region and beyond, through ASEAN and ASEAN –led mechanism and adopts internationally-accepted maritime conventions and principles;
8. A community that strengthens ASEAN unity, cohesiveness and ASEAN centrality as well as remains the primary driving force in shaping the evolving regional architecture that is built upon ASEAN-led mechanisms; and
9. A community, in the interest of developing friendly and mutually beneficial relations, that deepens cooperation with Dialog Partners, strengthens engagement with other external parties, reaches out to potential partners, as well as responds collectively and constructively to global developments and issues of common concern.

The APSC blueprint 2025 shall comprise the following four key characteristics which are inter-related and mutually reinforcing, and shall be pursued in a balanced and holistic manner. First, a rule-based, people-oriented, people-centered community bound by fundamental principles, shared values and norms, in which ASEAN people enjoy human rights and fundamental freedoms and social justice, embrace the values of tolerance and moderation, and share a strong sense of togetherness, common identity and destiny. Secondly, a resilient community in a peaceful, secure and stable region, with enhanced capacity to respond effectively and a timely manner to challenges for the common good of ASEAN, in accordance with the principle of comprehensive security. Thirdly, an outward-looking community that deepens cooperation with external parties, uphold and strengthens ASEAN centrality in the evolving regional architecture, and plays a responsible and constructive role globally based on an ASEAN common platform on international issues. Finally, a community with strengthened institutional capacity through improved ASEAN work processes and coordination, increased effectiveness and efficiency in the work of ASEAN Organs and Bodies, including a strengthened ASEAN secretariat, as well as with increased ASEAN institutional presence at the national, regional and international levels.

In relation to the APSC Blueprint 2025, ASEAN would like to ensure a rule-based and inclusive community in which people enjoy human rights and fundamental rights. The key actions to achieve this kind of community are, among others, to promote understanding and appreciation of the political and legal systems, culture and history of ASEAN Member States, as well as to establish programmes for mutual support and assistance among ASEAN Member States in the development of strategies for strengthening the rule of law, judicial systems and legal infrastructure. Under the last-mentioned program, there are seven points of achievements or steps.

The first program is to entrust ASEAN Law Ministers Meeting (ALAWMM), with the cooperation of other sectoral bodies and entities associated with ASEAN, to develop cooperating programs to strengthen the rule of law, judicial systems, and legal infrastructure. The second programme is to continue the work of the existing working groups of ALAWMM and ASEAN Senior Law Officials Meetings (ASLOM) to strengthen legal infrastructure in ASEAN, including the ASLOM Working Group on Judicial Assistance in Civil and Commercial Matters as well as support activities and programmes to strengthen networking and cooperation among the judiciaries in the ASEAN Member States. The third program is to support activities and programs to strengthen networking and cooperation among the judiciaries in the ASEAN Member States. The fourth program is about to enhance access to legal assistance in the ASEAN Member States to promote social justice through more public education and outreach regulation. The fifth program is interesting since it is to undertake the comparative studies for lawmakers on the promulgation of law and regulations. The sixth and seventh programs are about promoting the development of university curricula on legal systems and enhance cooperation between ALAWMM through seminars, workshops, and research on international laws, including ASEAN Agreements.[569]

It is worth to note that in relation to assurance of a rule-based community, ASEAN has the ASEAN Charter which took place on November 20, 2007. In relation to the human rights and fundamental freedom, ASEAN established the ASEAN Intergovernmental Commissions on Human Rights (AICHR) which led ASEAN to declare the right to marry and to promote and protect the right of women and children.[570] On the other hand, point No. 2 of the achievements as mentioned above *"ensures the people in ASEAN enjoy human rights and fundamental freedoms .... in accordance with the principle of democracy, good governance and the rule of law"* shall encourage and promote the harmonization of marriage laws, at least the right to marry, amongst the ASEAN Member States.

[569] Point A.2.4. of *ASEAN Vision 2025: Forgoing Ahead Together*, p. 25.

[570] Please see more discussion on this topic in sub-paragraph 2.2 regarding the Human Rights in ASEAN.

1.2.2 ASEAN Economic Community

The AEC Blueprint 2015 is built on four interrelated and mutually reinforcing pillars: (a) single market and production base; (b) a highly competitive economic region, (c) a region of equitable economic development, and (d) a region fully integrated into the global economy.[571]

Therefore, ASEAN Member States undertake to realize:[572]

1. A highly integrated and cohesive regional economy that supports sustained high economic growth by increasing trade, investment, and job creation; improving regional capacity to respond to global challenges and mega trends; advancing a single market agenda through enhanced commitments in trade of goods, and through an effective resolution of non-tariff barriers; deeper integration in trade services; and a more seamless movement of investment, skilled labor, business players, and capital;
2. A competitive, innovative and dynamic community which fosters robust productivity growth including through the creation and practical application of knowledge, supportive policies towards innovation, science-based approach to green technology; promotion of good governance; transparency and responsive regulations; effective dispute resolution; and a view towards enhanced participation in global value chains;
3. Enhanced connectivity and sectoral cooperation with improvements in regional frameworks, including strategic sectoral policies vital to the effective operationalization of the economic community;
4. A resilient, inclusive, people-oriented and people-centered community that engenders equitable developments and inclusive growth; a community with enhanced micro, small and medium enterprise development policies and cooperation to narrow development gaps; and a community with effective business and stakeholder engagement, sub-regional development cooperation and projects, and greater economic opportunities that support poverty eradication; and
5. A global ASEAN that fosters a more systematic and coherent approach towards its external economic relation; a central and foremost facilitator and driver of regional economic integration in East Asia; and a united ASEAN with an enhanced role and voice in global economic fora in addressing international economic issues.

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[571] ASEAN, *A Blueprint for growth, ASEAN Economic Community 2015: Progress and Key Achievements*, (Jakarta: Asean Secretariat, 2015), p. 5.

[572] *Ibid.*

The five characters above then adopted as the characters of AEC. Some efforts related to the AEC had been prepared before the setting up AEC. The Hanoi Plan of Action is one of them, with the main purpose of pursuing the consolidation and strengthening of economic fundamentals of the ASEAN Member States.[573]

The development of the Post-2015 vision for AEC will be undertaken in synergy with other pillars of the ASEAN Community, covering a period of 2016-2025. For this purpose, ASEAN Member States' leaders signed the *ASEAN 2025: Forgoing Ahead Together* which adopted the ASEAN Community Vision 2025.[574]

As part of the *ASEAN 2025: Forgoing Ahead Together*, the member states entered into the ASEAN Economic Community 2025 Consolidated Strategic Plan. This consolidated action plan incorporates and carries forward the work of AEC Blueprint 2015 and chart of the broad trajectories of ASEAN economic integration from 2016-2025 following the formal establishment of the AEC on December 31, 2015.[575] This document mentions the aims of AEC 2025 to strengthen and reinforce its five characteristics. In order to achieve the characteristic of AEC, strategic measures as operationalized by key action lines will be pursued by relevant ASEAN sectoral bodies through their corresponding sectoral work plans. This document also provides the timelines for each key action line.

AEC has been developed as such from its beginning with a lot of efforts. The author honors the idea of ASEAN leaders who have a sense of willingness and concern to always welcome reforms by setting this ASEAN Economic Community 2025 Consolidated Strategic Plan. In relation to the AEC 2025, the freedom of movement of ASEAN workers shall be one of the reasons of harmonization of marriage law in ASEAN. It is also interesting to see that this consolidated action plan states the efforts

[573] There were ten elements that are to be fulfilled in order to achieve the specific targets, recapitulated as follows: 1. Strengthen macroeconomic and financial cooperation; 2. Enhance greater economic integration; 3. Promote science and technology development and develop information technology infrastructure; 4. Promote social development and address the social impact of the financial and economic crisis; promote human resources development; 6. Protect the environment and promote sustainable development; 7. Strengthen regional peace and security; 8. Enhance ASEAN's Role as an effective force for peace, justice and moderation in the ASIA-Pacific and in the World; 9 Promote ASEAN awareness and its standing in the international community and 10. Improve ASEAN structure and mechanism. See Hanoi Plan of Action on 6th ASEAN Summit 1998, at http://asean.org/?static_post=hanoi-plan-of-action , last accessed on 30 June 2017. This plan of Action was the first stage in a series of action of ASEAN to reach its goals. This plan became the foundation of economic cooperation and integration within ASEAN Member States.

[574] ASEAN, *ASEAN 2025: Forgoing Ahead Together* (Jakarta: ASEAN Secretariat, 2015), p. 10. See the official website of ASEAN available at http://asean.org/?static_post=asean-2025-forging-ahead-together, last accessed on 30 June 2017.

[575] For more details of point ASEAN Economic Community 2025, please see *ASEAN Economic Community 2025 Consolidated Strategic Action Plan*, available at official Website of ASEAN at http://asean.org/aec-2025-consolidated-strategic-action-plan/, last accessed on 30 June 2017.

to implement the unification and harmonization of laws among the ASEAN Member States in which the Private International Law can play a major role.[576]

In relation to the development of AEC, it is clear that AEC is parallel to the European Economic Community (EEC) in stepping on four interrelated and mutually reinforcing pillars for AEC.[577] However, there are some differences between AEC and EEC. The institutional environment facing ASEAN in the first decade of the 21st century is far different than that of the EEC in its beginning in the 1950s. The international economic environment is far different today than it was in the 1950s. For instance, the contemporary global marketplace is extremely open relative to the past. ASEAN features far greater diversity in terms of economic development. ASEAN is far open than Europe was in the 1950s.[578] In addition, the nature of the organization also makes MEA and EEC different. The European Union (EU) has its supranational body of EU and EEC is one of rule-based economic integration backed with hard law, which in essence ensures the implementation and enforcement of such economic community through a decision-making institution, a monitoring institution, and dispute settlement institution. It is worth to note that the EEC is the early step for deeper integration of EU. While ASEAN is an inter-governmental cooperation, and presently it has the ASEAN Charter. In relation to decision-making institution, ASEAN is still attached to the "ASEAN Way" known as non-interference, consultation (*musyawarah*) and consensus (*mufakat*), avoiding confrontation. In relation to this, once it was stated as "fairly loose and unstructured".[579]

Comparing the EEC and AEC, the Governor of the Bank of Thailand stated that AEC is not, and has no intention of transforming ASEAN into a European style union. ASEAN should refrain from perpetuating any grand, Euro-style visions. Although ASEAN is aware that ASEAN lacks supranational policy-making bodies like the European Central or the European Commission which is required to make such an entity functions properly.[580] In relation to this, ASEAN can learn particular matters from EU because it

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[576] The group discussion covers among others the unification of consumer protection, harmonization of competition law, the unification and harmonization of intellectual property law, etc.

[577] Four interrelated and mutually reinforcing pillars for AEC are: (a) single market and production base; (b) a highly competitive economic region, (c) a region of equitable economic development, and (d) a region fully integrated into the global economy.

[578] Michael G. Plummer, *The ASEAN Economic Community and the European Experience,* Working Paper Series in Regional Economic Integration No. 1, Asian Development Bank, pp. 8-9. See also

[579] "ASEAN Way" will be more elaborated in the next Sub-chapter 4.2.3.1.Martin Russel, *ASEAN: building an Economic Community,* in *European Parliamentary Research Service,* December 2014, available at www.europarl.europa.eu/RegData/etudes/.../EPRS_ATA(2014)542171_REV1_EN.pdf*, last accessed on 19 February 2018.*

[580] The governor of the Bank of Thailand, Dr. Prasarn Trairatvorakul statement at Sasin Update-Reunion 2011. See *"ASEAN Economic Community and the European Union's Experience"* in *Siam Premier International Law Office Limited* dated 1 November 2012, available at https://siampremier.com/asean-economic-community-and-the-european-unions-experience/, last accessed on 20 February 2018.

is proven to have existed for decades. Yet, due to its current severe challenges to EU integration, for instance Brexit, ASEAN has more reasons to decline any invitation or advice to take EU as a model for its integration. Although ASEAN can learn a lot of things from EU, ASEAN has its own culture and style, capital and mode, to form its integration according to its own style.[581] As long as all of the member states have mutual benefit from the AEC, have the political will and the four pillars, AEC can be firmly established, grow and develop according to its needs. And from there, ASEAN can further have a deeper integration in the other two pillars, the APSC and ASCC.

1.2.3 ASEAN Socio-Cultural Community

ASEAN Socio-Cultural Community (ASCC) by 2025 shall be a united, inclusive and resilient community. The ASEAN people shall live in a safe, harmonious and secure environment, embrace the values of tolerance and moderation as well as uphold ASEAN fundamental principles, shared values, and norms. ASEAN shall be cohesive, responsive and relevant in addressing challenges to regional peace and security as well as play a central role in shaping the evolving regional architecture while deepening the ASEAN engagement with external parties and contributing collectively to global peace, security, and stability.[582]

Therefore, ASEAN Member States undertake to realize:

1. A committed, participative and socially-responsible community through an accountable and inclusive mechanism for the benefit of all ASEAN people, upheld by the principle of good governance;
2. An inclusive community that promotes high quality of life, equitable access to opportunities for all and promotes and protects human rights of women, children, youths, the elderly/old people, people with disabilities, migrant workers, and vulnerable and marginalized groups;
3. A sustainable community that promotes social development and environmental protection through effective mechanisms to meet the current and future needs of the peoples;
4. A resilient community with enchanted capacity and capability to adapt and respond to social and economic vulnerabilities, disasters, climate change as well as emerging threats and challenges; and

[581] *"What Lessons Can ASEAN Learn from the EU?"* in Knowledge Wharton, University of Pennsylvania, March 10, 2016, available at http://knowledge.wharton.upenn.edu/article/what-lessons-can-asean-learn-from-the-eu/ last accessed February 20, 2018.

[582] ASEAN, *ASEAN 2025: Forgoing Ahead Together,* pp. 14-15. See also the official publication by ASEAN, available at: http://asean.org/?static_post=asean-socio-cultural-community-blueprint-2025, last accessed on February 19, 2018.

5. A dynamic and harmonious community that is aware and proud of its identity, culture, and heritage with a strengthened ability to innovate and proactively contribute to the global community.

Within the framework of ASCC, ASEAN has helped to strengthen commitments in the form of policy and legal frameworks, among other the Declaration on Elimination of Violence Against Women and Elimination of Violence Against Children.[583] In relation to the latter, ASCC provides that the strategic measures on promotion and protection of human rights shall cover, among others, to promote regional inter-sectoral mechanism towards a holistic and multi-disciplinary approach to enhancing quality care, well-being, gender equality, social justice, human rights and fundamental freedoms, especially the vulnerable groups, in response to all hazards and emerging social and economic risks/ threats. Besides, it shall provide regional platforms for dialogue and support initiatives to address issues of traditional practices that impinge upon the fulfillment of rights. It supports accelerated implementation among the ASEAN Member States to extend coverage, accessibility, availability, comprehensiveness, quality, equality, affordability and sustainability of social services and social protection, as well as to enhance the effective implementation of relevant ASEAN declarations and instruments related to human rights.[584]

Looking to the strategic measures, the protection of the rights of women and children becomes one of the attentions. It shows that ASEAN has eminent deliberation on the same and is in position to implement the protection of the rights of women and children.

1.2.4 ASEAN Connectivity 2025

ASEAN Connectivity 2025 is an integral part of ASEAN Forgoing Ahead Together 2025. Initially, it was adopted in Hanoi, Vietnam on October 20, 2010. Further, it is adopted in the Vientiane Declaration on the Adoption of the Master Plan in ASEAN Connectivity 2025. This declaration affirms the vision of ASEAN leaders to build the ASEAN Community that will contribute to a more competitive, resilient and well-connected ASEAN.[585]

The connectivity in ASEAN encompasses the physical (e.g. transport, ICT and energy), institutional (e.g. trade, investment and service liberation) and people-to-people linkages (e.g. education, culture and tourism) that are the basic supportive means to achieve the APSC, AEC and ASCC. The vision for the ASEAN Connectivity 2025 is to achieve a

[583] *Ibid*., p. 103.
[584] *Ibid*. p. 109.
[585] ASEAN, *Master Plan on ASEAN Connectivity 2025* (Jakarta; The ASEAN Secretariat), pp. 3-8.

seamlessly and comprehensively connected and integrated ASEAN that will promote competitiveness, inclusiveness and a greater sense of community.

The three pillars above which are supported by the ASEAN Connectivity 2025 are under construction and are still under development within ASEAN. In relation to this writing, the attention to CEDAW and CRC from the first and third pillars is reasonably proper to empower ASEAN to harmonize the marriage law that constitutes the topic of this research.

1.3 Fundamental Principles of ASEAN

ASEAN Member Countries have adopted the pursuing fundamental principles in dealing with one another, as described in the Treaty of Amity and Cooperation in Southeast Asia (TAC), signed on February 24, 1976:[586]

1. *"mutual respect for the independence, sovereignty, equality, territorial integrity, and national identity of all nations;*
2. *the right of every State to lead its national existence free from external interference, subversion or coercion;*
3. *non-interference in the internal affairs of one another;*
4. *settlement of differences or disputes by peaceful manner;*
5. *reunification of the threat or use of force; and*
6. *effective cooperation among themselves."*

The principle of non-interference is a principle based on the notion of equality of sovereign states in international systems.[587] The concept of state sovereignty defines that no sovereign may exercise its authority in the domain of another. Conventionally, the principle of non-interference is understood that governments can only attempt to influence each other's behavior by establishing diplomatic channels. The governments cannot seek to expand its influence by a direct appeal to the citizen of another country, or by occupation, or by using its territory as a base for opposing another regime. In other

[586] Art. 2 of the Association's Treaty of Amity and Cooperation.

[587] ASEAN applies its non-confrontational style to the situation, through direct and indirect measures of restraint, pressure, diplomacy, communication and trade-off. Based on this approach, some conflicts in ASEAN can be resolved without any force. For instance, the Cambodian conflict whereby ASEAN played an important role, see Gillian Goh, *The "ASEAN Way" Non-intervention and ASEAN's Role in Conflict Management,* Stanford Journal of East Asian Affairs Vol. 3 No. 1 Spring 2003, pp. 113-118. In the dispute over Sabah, see A. Jorgensen-Dahl, *Regional Organization Order I Southeast Asia* (London: Macmillan, 1982), and T.S. Lau, "Conflict-Resolution in ASEAN: The Sabah Issue" in T.S. Lau, ed., *New Directions in the International Relations of Southeast Asia* (Singapore: University of Singapore Press, 1973). See also Tobias Ingo Nischalke, *Insights from ASEAN's Foreign Policy Co-operation: The "ASEAN Way", a Real Spirit or a Phantom?* Contemporary Southeast Asia, Vol. 22 No. 1, April 2000, pp. 89-112.

words, non-intervention means "let other nation alone". This principle is also known as one of the characteristics of the "ASEAN Way".

In Bangkok declaration in 1967, ASEAN proclaimed that one of its determinations is "to ensure their stability and security from external interference in any form or manifestation". In the other ASEAN declaration, the so-called "Zone of Peace, Freedom and Neutrality Declaration" in Kuala Lumpur in 1971, ASEAN restated that every state, regardless of its size, has the right "to lead its national existence free from outside interference in its internal affairs".

In the Treaty of Amity and Cooperation in Southeast Asia, ASEAN committed itself to certain principles, including "mutual respect for the independence, sovereignty equality, territorial integrity and national identity of all nations; the right of every State to lead its national existence free from external interference, subversion or coercion and; non-interference in the internal affairs of one another". This principle is reaffirmed in the "Declaration of ASEAN Concord" or known also as the Bali Concord in Indonesia in 1976. It states that "*Member states shall vigorously develop an awareness of regional identity …in accordance with the principles of self-determination, sovereign equality and non-interference in the internal affairs of nations.*"

In the ASEAN Charter in 2007, ASEAN reaffirmed once again its intention to "respect the fundamental importance of amity and cooperation, and the principles of sovereignty, equality, territorial integrity, non-interference, consensus and unity in diversity" in its preamble. In article 2, it also mentions "non-interference in the internal affairs of ASEAN Member States".

1.4 External Relations of ASEAN

The Member States of ASEAN broaden the areas of cooperation with another state in order to strengthen the region and to secure the recognition of ASEAN. For this purpose, the ASEAN leaders developed partnership with states and international organizations as part of ASEAN's strategy to drive the regional development.

The first partnership of ASEAN started with Japan in 1973. In 1977, the Minister Takeo Fukuda, well-known as the "Fukuda Doctrine" re-assured the Japan's policy to support the national development of ASEAN Member States.[588] In order to apply such policy,

[588] Fukuda Doctrine was a visionary initiative that transformed Japan's relation with Southeast Asia. Its implementation significantly improved Japan's image in Southeast Asia. It enabled Japan to contribute politically to Southeast Asian affairs and laid the foundations of strong relationship between Japan and Southeast Asia. In addition, some scholars suggested that Japan should implement a similar doctrine towards Northeast Asia. See further, Lam Peng Er (Ed.), *Japan's Relations with Southeast Asia: The Fukuda Doctrine and Beyond* (Oxon: Routledge, 2013). See also Kei Koga, *Transcending the Fukuda Doctrine, Japan, ASEAN, and the Future of the Regional Order,* Center for Strategic & International Studies.

the cooperation shall be based on three principles announced in Manila; first, Japan rejects the role of a military power. Second, Japan will do its best to consolidate the relationship of mutual confidence and trust based on "heart-to-heart" understanding. Third, Japan will be an equal partner of ASEAN, while attempting to foster mutual understanding with Indochina.[589]

The Republic of Korea is the second partner of ASEAN. The first cooperation dialogue was in 1989, covering trade, investment, and tourism areas. This partnership was upgraded in 1991 in the 24th ASEAN Ministerial Meeting in Kuala Lumpur.[590]

Following the aforementioned cooperation, some states also started a cooperation dialogue with ASEAN, among others Australia, Canada, China, India, New Zealand, Russia, the United States and Pakistan.[591]

In addition to cooperation with states, ASEAN also attempts to have cooperation with international organizations, among others Asia-Pacific Economic Cooperation (APEC) and European Union (EU). APEC is a forum to seek the promotion of free trade and economic cooperation as well as investment throughout the Asia-Pacific region.[592] ASEAN collaborated with Australia in establishing APEC in 1989 in response to the growing interdependence of the ASIA-Pacific economies and the arrival of regional blocs in other parts of the world such as the European Union. The APEC Secretariat is located in Singapore, proving that ASEAN is fully and actively support APEC. The ASEAN-EU dialogue was officially held in the 10th ASEAN Foreign Minister Meeting (AMM) in July 1977. Based on that meeting, ASEAN's formal cooperation and relationship with the European Economic Community (EEC), which included the Council of Ministers of the EEC, the Permanent Representative of the EEC states and the EEC Commission, was agreed.

ASEAN itself, recommended the idea of AFTA by signing the Framework Agreement on Enhancing the ASEAN Economic Cooperation. It is a wide-ranging program of tariff

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[589] Sueo Sudo, *The Fukuda Doctrine and ASEAN: New Dimensions in Japanese Foreign Policy, Institute of South Asian Studies,* 1992, pp. 4.

[590] Official ASEAN Website, *ASEAN-Republic of Korea Dialogue Relations,* available at http://asean.org/asean/external-relations/republic-of-korea-rok , last accessed on December 20, 2016.

[591] *Ibid.*

[592] Until now, APEC consists of 21 member economies: alphabetically, Australia, Brunei Darussalam, Canada, Chile, China, Chinese Taipei, Hong Kong, Indonesia, Japan, Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, Russia, Singapore, Thailand, the United States and Vietnam. The criterion of membership is that a member is a separate economy rather than a state. APEC uses such term because it predominantly concerns with trade and economic issues with members engaging with one another as economic entities. As a result, APEC use the term "member economies" rather than states, and such term results in the membership of the forum which also includes Taiwan and Hong Kong. APEC also includes three official observers: ASEAN, The Pacific Island Forum, and the Pacific Economic Cooperation Council. See the official website of APEC available at http://www.apec.org/About-Us/About-APEC/Member-Economies.aspx, last accessed on December 21, 2016.

reduction in the region to attract foreign direct investment into ASEAN. AFTA has a mechanism to achieve its goals by the so-called Common Effective Preferential Tariff (CEPT), which only applies to goods originating within ASEAN.[593]

2 Background of harmonization and unification of international family law in ASEAN

2.1 Free of Movement within ASEAN in the framework of AEC

The objective of ASEAN Economic Community (AEC) is to transform ASEAN into a region with free movement of goods, services, investments, skilled labors and freer flow of capital. Through the AEC, ASEAN will become a single market with a vision to get more competitive with new processes to strengthen the existing economic condition and to facilitate movement of business. AEC integrates many policies for anticipating and eliminating obstacles such as the non-barriers, then builds the commitments to the strengthening of measures for trade facilitation, and creates harmonization of laws and regulations to broaden and deepen economic integration. Besides the one single market, AEC also has a purpose to create a Competitive Economic Region, by including six core elements, namely: Competitive Policy, Consumer Protection, Intellectual Property Rights, Infrastructure Development, Taxation and E-Commerce.[594]

In relation with the Vision 2015, the AEC is further described in the AEC blueprint 2025. The overall vision articulated in the AEC Blueprint 2015 remains relevant. The AEC Blueprint 2025 will build on the AEC Blueprint 2015 consisting of five interrelated and mutually reinforcing characteristics, namely (i) A highly integrated and cohesive economy; (ii) A competitive, innovative and dynamic ASEAN; (iii) Enhanced connectivity and sectoral cooperation; (iv) a resilient, inclusive, people-oriented and people-centered ASEAN; and (v) a global ASEAN.

One of the points is that ASEAN will widen ASEAN people-to-people, institutional, and infrastructure connectivity through ASEAN and sub-regional cooperation projects that facilitate movement of capital as well as skilled labor and talents. The objective to facilitate the movement of skilled labor in ASEAN began with MRAs that would allow practitioners in eight professions to practice in other ASEAN Member States through mutual recognition of their qualifications and, where appropriate, through the

[593] AFTA is formed to increase the ASEAN region's competitive advantages as a production base geared for the world market. Such establishment is to compete the regional bloc such as the EU and the North American Free Trade Agreement (NAFTA). It is a common reaction since globalization also influences Southeast Asian region. See Official Webpage of ASEAN, ASEAN Free Trade Agreement available at http://asean.org/asean-economic-community/asean-free-trade-area-afta-council/

[594] Official Webpage of ASEAN, Official Webpage of ASEAN, ASEAN Economic Community, available at http://asean.org/asean-economic-community/ , last accessed on June 27, 2017.

implementation of the ASEAN qualifications Reference framework, for which referencing by the ASEAN Member States is voluntary, to support lifelong learning and enhance recognition and the ASEAN Agreement on Movement of Natural Persons (MNP). These arrangements aim to facilitate the temporary cross-border movement of natural persons and business visitors engaged in the conduct of trade in goods, trade in services, and investment.[595]

The one single market which also includes the free movement of skilled labors, provides broader chance for employees to come across countries within ASEAN to find a better job or opportunity as well as experience. Such chance can also facilitate personal relationship with cross-border dimensions. The existence of "international mixed marriages" and further, international family law become indirect consequences yet expected. The possibility of the same is enormous.

2.2 Human Rights in ASEAN

ASEAN has a particular declaration on the human rights. The declaration is adopted by the Heads of State/Government of ASEAN Member States in Cambodia on November 18, 2012. The declaration is about to confirm the adherence to purposes and principles of ASEAN, in particular to the promotion and protection of human rights and fundamental freedoms, as well as the principles of democracy, the rule of law and good governance. Such declaration is reaffirming the commitment of the ASEAN Member States to the Universal Declaration of Human Rights, the Charter of the United Nations, the Vienna Declaration and Programme of Action, CEDAW and other international human rights instrument to which the ASEAN Member States are parties.

The ASEAN Human Rights Declaration mentions about nine general principles of human rights. Among others, all people are born free and equal in dignity and rights. They are granted with reason and conscience and should act towards one another in a spirit of humanity. Every person is entitled to the rights and freedoms as mentioned in the ASEAN Human Rights Declaration without any distinction.[596]

The declaration balances rights against obligations by mentioning that the enjoyment of human rights and fundamental freedom must be balanced against the performance of

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[595] ASEAN, *ASEAN Economic Community Blueprint 2025* (Jakarta: ASEAN Secretariat, 2015), pp. 2 & 10.

[596] ASEAN, ASEAN Human Rights Declaration, Point No. 1-5. *"1. All persons are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of humanity. 2. Every person is entitled to the rights and freedoms set forth herein, without distinction of any kind, such as race, gender, age, language, religion, political or other opinion, national or social origin, economic status, birth, disability or other status. 3. Every person has the right of recognition everywhere as a person before the law. Every person is equal before the law. Every person is entitled without discrimination to equal protection of the law. 4. The rights of women, children, the elderly, persons with disabilities, migrant workers, and vulnerable and marginalized groups are an inalienable, integral and indivisible part of human rights and fundamental freedoms."*

corresponding duties because every person has responsibilities to other individuals, the community and the society where he/she lives. The ultimate responsibility of all ASEAN Member States is to promote and protect all human rights and fundamental freedoms.[597]

According to the ASEAN Human Rights Declaration, all human rights are universal, indivisible, interdependent and interrelated. All human rights and fundamental freedoms must be treated in a fair and equal manner, on the same foundation and with the same emphasis. Yet, at the same time, the realization of human rights must be considered in the regional and national context bearing in mind different political, economic, legal social, cultural, historical and religious backgrounds. The exercise of human rights and fundamental freedom shall be subject only to such limitations as determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, and to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society.[598]

The principle of impartiality, objectivity, non-selectivity, non-discrimination, non-confrontation and avoidance of double standards and politicisation, should always be upheld in the realization of the human rights and fundamental freedom. The process of such realization shall take into account peoples' participation, inclusivity and the need for accountability.[599]

The ASEAN Human Rights Declaration in general divided the rights into four categories; the first is the civil and political rights; the second is the economic, social and cultural rights; and the third is the right to development; and the last one is the right

[597] *Ibid.,* Point No. 6. *"The enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community and the society where one lives. It is ultimately the primary responsibility of all ASEAN Member State to promote and protect all human rights and fundamental freedoms."*

[598] *Ibid.,* Point No. 7-8. *"7. All human rights are universal, indivisible, interdependent and interrelated. All human rights and fundamental freedoms must be treated in a fair and equal manner, on the same footing and with the same emphasis. At the same time, the realization of human rights must be considered in the regional and national context bearing in mind different political, economic, legal social, cultural, historical and religious background. 8. The human rights and fundamental freedoms of every person shall be exercised with due regard to the human rights and fundamental freedoms of others. The exercise of human rights and fundamental freedom shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, and to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society."*

[599] *Ibid.,* Point No. 9. *"In the realisation of the human rights and freedoms contained in this Declaration, the principle of impartiality, objectivity, non-selectivity, non-discrimination, non-confrontation and avoidance of double standards and politicisation, should always be upheld. The process of such realisation shall take into account peoples' participation, inclusivity and the need for accountability."*

to peace.[600] Upon these rights, the ASEAN Member States share a common interest in and commitment to the promotion and protection which shall be achieved through, inter alia, cooperation with another as well as with the relevant national, regional and international institutions/organizations, in accordance with the ASEAN Charter.[601]

The human rights have universal values. In some aspects, they give implication to the family law at the national level, for instance marriage, family and its relations. At least, the "family" and "the right to marry"[602] need to have more explanation and elaboration. Interpretation to the provision stated in the convention needs guidance. For instance, interpretation based on doctrine of the margin of appreciation and the principle of proportionality.[603] The margin of appreciation means that when making a decision involving a Convention right, a state has a measure of direction, which is subject to the ultimate supervision of the Convention organs. This application shall not be rigid, as it may vary in each case and each article. The basis of this doctrine is that the States and national courts are in a better position than international judges to strike an appropriate balance in the furtherance of legitimate public purposes in their own jurisdiction. The principle of proportionality requires a reasonable relationship between the means employed and the aim sought to be realized. It is expressed as inherent in the whole Convention in a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental human rights.[604]

The interpretation shall imply family relations in a wider scope. In cases, it can be the concept of family relationship and the definition of a "marriage", and its further implication. For instance, whether or not a family shall only be based on marriage or natural parents. The other issues are gender, transsexual issues and the right to marry, the protection to removal of children from parents and the natural bond between parents

[600] First, the civil and political rights are mentioned in points No. 10-25. Second, the economic, social and cultural rights are mentioned in points No. 26-34. and Third, the right to development are mentioned in points No. 35-37. Fourth, the right to peace is mentioned as point No. 38.

[601] ASEAN, ASEAN Human Rights Declaration, *Loc. Cit.*, Point 39. *"39. ASEAN Member States share a common interest in and commitment to the promotion and protection of human rights and fundamental freedoms which shall be achieved through, inter alia, cooperation with another as well as with relevant national, regional and international institution/organisations, in accordance with the ASEAN Charter."*

[602] Point 19 of the ASEAN Human Rights Declaration. *"19. The family as the natural and fundamental unit of society is entitled to protection by society and each ASEAN Member State. Men and women of full age have the right to marry on the basis of their free and full consents, to found a family and to dissolve a marriage, as prescribed by law."*

[603] Peter De Cruz, *Family Law, Sex and Society* (Oxon: Routledge, 2010), pp. 322-338.

[604] *Ibid.*

and children, etc.[605] Those matters need profound considerations and thoughts rooted to the ASEAN culture and values.

Having observed those matters, it appears that recognition of the executed right to marry revealed into a marriage based on a prevailing national law of member states, becomes important. It gives pivotal influence in respect of the "family relation", because it can instigate a limping relationship in a marriage and the family relationship.

For the purpose of dealing with the human rights issues and protection for the women and children, ASEAN has two organs, namely the ASEAN Intergovernmental Commission on Human Rights and ASEAN Commission on the Rights of Women and Children.

2.2.1 Right to Marry in the Framework of Human Rights

In the framework of human rights as stated in the ASEAN Human Rights Declaration, the right to marry is stated in point No. 19. It is stated that:

> *"The family as the natural and fundamental unit of society is entitled to protection by society and each ASEAN Member State. Men and women of full age have right to marry on the basis of their free and full consent, to found a family and to dissolve a marriage, as prescribed by law."*[606]

A family has a very important role in the community. It is stated as a natural and fundamental unit of society. Some people say that such statement is equal to a statement that "sky is blue" or "wave crashes on seashore". It is natural and no one can argue or agree more on that statement. The statement that a family is the natural and fundamental unit of society is accepted in general. A family has the primary responsibility for the nurturing and protection of children. Children, for the full and harmonious development of their personality, should grow up in a family environment and in an atmosphere of happiness, love, and understanding.[607] For its significant fact, the society and each of ASEAN Member States must give reasonable protection.

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[605] As comparison, the European Court of Human Right in interpreting the Convention for the Protection of Human rights and Fundamental Freedom, known as the European Convention on Human Rights made interpretation based on doctrine of the margin of appreciation and the principle of proportionality. The case law has determined that there are four underlying principles which justify interference in a Convention right. The interference must be in accordance with the law, serve a legitimate aim necessary in a democratic society; and not discriminatory. Based on the interpretation, the concept in the convention is tested, for instance the concept of "family", the relation of family between non-biological parents and children, protection based on mere biological relationship, family relationship based on blood or legally recognised relationship, cohabitation as well as the parents and children, the factors which might establish the existence of "family", transgender and the right to marry, etc. See Peter De Cruz, *Family Law, Sex and Society* (Oxon: Routledge, 2010), pp. 322-338.

[606] *Ibid.,* Point No. 19.

[607] United Nations, *Convention on the Right of the Child of the United Nations,* dated November 20, 1989, the Preamble.

Men and women respectively have the right to marry. Yet, the right to marry does not come at their birth. The right to marry is due when they reach the full age, only at such age, they are eligible to marry. In other words, they are entitled when they are grown-up enough. In addition, a marriage they enter into must be a voluntary marriage without any suppression or fraud.

From the article above and in relation to the formation of marriage, the following can be summarized. First, the society and ASEAN Member States must provide a reasonable protection for family; Second, men and women at their full age have the right to marry. Third, marriage must fulfill the requirements of full age and free and full consent.

2.2.2 ASEAN Intergovernmental Commission on Human Rights (AICHR)

The General Assembly of United Nations encourage the infrastructure development of human rights in the region in the era of 1960s. The similarity of culture, history, and geography between the relevant countries can cause the development of infrastructure become easier than the development of international infrastructure. A recommendation and or publication of violence of human rights issued by a regional institution, for instance, ASEAN, will be easier to be accepted and by the society of ASEAN, therefore, more effective. The same situation applies to the other regions.[608]

After the infrastructure development of human rights in several regional,[609] ASEAN culminated in a covenant to establish a commission on human rights. The ASEAN Member States agreed to establish a commission on human rights which was then referred to as the ASEAN Intergovernmental Commission on Human Rights (the "**AICHR**").[610] The charter of its establishment was signed on December 15, 2008 and ratified by each of ASEAN Member States. The charter, particularly Art. 14, gives a mandate to the foreign ministers of each member state to establish a commission on

[608] Wakil Indonesia untuk AICHR, *Prospek Mekanisme HAM ASEAN*, available at the official website of AICHR of Indonesia at http://aichr.or.id/index.php/id/aichr-indonesia/akuntabilitas-publik/rilis/23-prospek-mekanisme-ham-asean?showall=1&limitstart, last access on June 27, 2017. In addition, the development of regional infrastructure shall be a counterclaim that the concept of human rights is a contemporary device of western imperialism. The regional infrastructure can also be considered as the counterbalance of pressure from "foreign parties".

[609] There are regional human rights instruments in other regions which were established before AICHR, among others, the African Charter on Human and Peoples' Rights that came into effect on October 21, 1986 and its commission is the African Commission on Human and Peoples' Rights (ACHPR); the American Convention on Human Rights and the European Convention on Human Rights and the commission were referred to as the Inter-American Commission on Human Rights (IACHR).

[610] It is interesting and worth to note that the establishment of AICHR involved the civil society. The non-governmental organizations formed a working group to negotiate with the officials and then, submitted a proposal for the Agreement on the Establishment of the ASEAN Human Rights Commissions. See Hadi Rahmat Purnama, *Masyarakat Sipil dan Mekanisme ASEAN Intergovernmental Commission on Human Rights: Studi Kasus International Human Rights Treaty Bodies,* in *Jurnal Hukum dan Pembangunan,* Vol. 42 No. 4 (2012), pp. 476-480.

human rights.[611] On the 14th summit of ASEAN, the Terms of Reference (the "**TOR**") of AICHR were agreed and om the next summit of ASEAN, the 15th summit of ASEAN, the AICHR was inaugurated.

ASEAN has its own way in working in the human rights and its commission within ASEAN. The members traditionally viewed them as foreign, culturally relevant and best dealt with at the national level. The nature of a functioning human rights protection mechanism is to investigate human rights abuses by states. The ASEAN Way approach undermines this function because monitoring entails inference in domestic affairs to scrutinize national legislation and policy. ASEAN Member States do not allow this. The AICHR's terms of reference reflect this and grant no mandate to investigate or enforce human rights law. Civil society's participation has been curtailed. Human rights issues remain internal matters of domestic jurisdiction, subject to the national law and local interpretation. Although there were some opinions cynically mentioning those handling as the human rights law in ASEAN Way and doubting its future, a chance must be given to this commission.[612]

2.2.2.1 Purposes of AICHR

AICHR is an integral commission under the organizational structure of ASEAN. This commission constitutes an advisory body and an overarching human rights institution for ASEAN region with overall responsibility for the promotion and protection of human rights in ASEAN.[613] As stipulated in the TOR of AICHR, this commission shall operate, among others, to promote and protect human rights and fundamental freedoms of the people of ASEAN and to contribute to the realization of the purposes of ASEAN as set out in the ASEAN Charter in order to promote stability and harmony in the region, friendship and cooperation among ASEAN Member States, as well as the well-being, livelihood, welfare and participation of ASEAN peoples in the ASEAN Community building process.[614] In general, this commission will develop human rights within ASEAN by considering the regional ASEAN and the national interest.

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[611] ASEAN, Art. 14 of AICHR.

[612] See the speech the Minister of Foreign Affairs of Singapore as quoted by Hadi Rahmat Purnama, *Op. Cit.,* pp. 478-479. See also Daniel Aquirre, *Human Rights the ASEAN Way*, available at Daniel Aguirre, *Human Rights the ASEAN Way*, JURIST - Forum, Jan. 10, 2012, http://jurist.org/forum/2013/01/human-rights-the-asean-way.php.

[613] AICHR, Terms of Reference, Art. 3. *"The AICHR is an inter-governmental body and an integral part of the ASEAN organization structure. It is a consultative body."* See also Art. 6.8 of TOR of AICHR. *"6.8 The AICHR is the overarching human rights institution on ASEAN with overall responsibility for the promotion and protection of human rights in ASEAN."*

[614] *Ibid.* Art. 1. "*The purposes of the AICHR are: 1.1 to promote and protect human rights and fundamental freedoms of the peoples of ASEAN; 1.2 to uphold the right of the people of ASEAN o live in peace, dignity and prosperity; 1.3 to contribute to the realization of the purposes of ASEAN as set out in the ASEAN Charter in order to promote stability and harmony in the region, friendship and cooperation among ASEAN*

2.2.2.2 Principles of AICHR

AICHR shall operate according to the ASEAN Principles as prescribed in Art. 2 of the ASEAN Charter. In particular, it shall respect the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States. It shall not interfere the internal affairs of ASEAN Member States while upholding the Charter of United Nations and international law. AICHR commits to paying respect for different cultures, languages, and religions of the peoples of ASEAN while emphasizing their common values in the spirit of unity in diversity.[615]

2.2.2.3 Mandates and Function of AICHR

AICHR has particular mandates and functions of human rights. The TOR of AICHR describe the 14 mandates and functions, in particular, it has to develop strategies for the promotion and protection of human rights and fundamental freedoms to complement the building of the ASEAN Community. Also, it has to develop an ASEAN Human Rights Declaration with a view to establish a framework for human rights cooperation through various ASEAN conventions and other instruments dealing with human rights.[616]

Member States, as well as the well-being, livelihood, welfare and participation of ASEAN in the ASEAN Community building process; 1.4 to promote human rights within the regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking account the balance between rights and responsibilities; 1.5 to enhance regional cooperation with a view to complementing national and international efforts on the promotion and protection if human rights; and 1.6 to uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties."

[615] AICHR, Art. 2. *"The AICHR shall be guided by the following principles: 2.1 Respect for principles of ASEAN as embodied in Article 2 of the ASEAN Charter, in particular: a) respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States; b) non-interference in the internal affairs of ASEAN Member States; c) respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion; d) adherence to the rule of law, good governance, the principles of democracy and constitutional government; e) respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice; f) upholding the Charter of the United Nations and international law, including international humanitarian law, subscribed to by ASEAN Member States; and g) respect for different cultures, languages and religions of the peoples of ASEAN, while emphasising their common values in the spirit of unity in diversity. 2.2 Respect for international human rights principles, including universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms, as well as impartiality, objectivity, non-selectivity, non-discrimination, and avoidance of double standards and politicisation; 2.3 Recognition that the primary responsibility to promote and protect human rights and fundamental freedoms rests with each Member State; 2.4 pursuance of a constructive and non-confrontational approach and cooperation to enhance promotion and protection of human rights; and 2.5 Adoption of an evolutionary approach that would contribute the development of human tights norms and standards in ASEAN."*

[616] AICHR, Terms of Reference, Art. 4. *"Mandate and Functions: 4.1 To develop strategies for the promotion and protection of human rights and fundamental freedoms to complement the building of the ASEAN Community; 4.2 To develop an ASEAN Human Rights Declaration with a view to establishing a framework for human rights cooperation through various conventions and other instruments dealing with human rights; 4.3 To enhance public awareness of human rights among the peoples of ASEAN through education, research and dissemination of information; 4.4 To promote capacity building for the effective implementation of international*

2.2.2.4 Membership of AICHR

This commission consists of the ASEAN Member States and is chaired by the Representative of the Member State that is holding the Chairmanship of ASEAN.[617] Each state shall appoint a representative to AICHR to serve a term of three years and may be constitutively re-appointed for only one term.[618] The appointment of AICHR representative shall give due consideration to gender quality, integrity, and competence in the field of human rights.[619]

Each representative shall act impartially in accordance with the ASEAN Charter and TOR of AICHR. Each of them has the obligation to attend AICHR meetings. If he/she is unable to attend a meeting due to an exceptional circumstance, the Government concerned shall give formal notification to the Chairman of AICHR of a temporary representative with a full mandate to represent the Member State concerned.[620] Each representative shall enjoy immunities and privileges in its official activities of AICHR as are necessary for exercising their functions.[621]

AICHR works with all ASEAN sectoral bodies dealing with human rights to expeditiously determine the modalities for their ultimate alignment with AICHR. To this

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human rights treaty obligations undertaken by ASEAN Member States; 4.5 To encourage ASEAN Member States to consider acceding to and ratifying international human rights instruments; 4.6 To promote the full implementation of ASEAN instruments related to human rights; 4.7 To provide advisory services and technical assistance on human rights matters to ASEAN sectoral bodies upon request; 4.8 To engage in dialogue and consultation with other ASEAN bodied and entities associated with ASEAN, 4.9 To consult, as may be appropriate, with other national, regional and international institution and entities concerned with the promotion and protection of human rights; 4.10 To obtain information from ASEAN Member States on the promotion and protection of human rights; 4.11 To develop common approaches and positions on human rights matters of interest to ASEAN; 4.12 To prepare studies on thematic issues of human rights in ASEAN; 4.13 To submit an annual report on its activities, or other reports if deemed necessary, to the ASEAN Foreign Ministers Meeting; and 4.14. To perform any other tasks as may be assigned to it by the ASEAN Foreign Ministers Meeting."

[617] *Ibid.,* Art. 5.9. *"The Chair of the AICHR shall be the Representative of the Member State holding the Chairmanship of ASEAN."*

[618] *Ibid.,* Art. 5.5. *"5.5 Each Representative serves a term of three years and may be consecutively re-appointed for only one more term."*

[619] *Ibid.,* Art. 5.1-5.4. *"5.1 The AICHR shall consist of the Member States of ASEAN. 5.2 Each ASEAN Member State shall appoint a Representative to the AICHR who shall be accountable to the appointing Government. 5.3 When appointing their Representatives to the AICHR, Member States shall give due consideration to gender equality, integrity and competence in the field of human rights. 5.4 Member States should consult, if requires by their respective internal processes, with appropriate stakeholders in the appointment of their Representatives to the AICHR."*

[620] *Ibid.,* Art. 5.7 – 5.8. *"5.7 Each Representative, in the discharge of his or her duties, shall act impartially in accordance with the ASEAN Charter and this TOR. 5.8 Representative shall have the obligation to attend AICHR meetings. If a Representative is unable to attend a meeting due to exceptional circumstances, the Government concerned shall formally notify the Chair of the AICHR of the appointment of a temporary representative with a full mandate to represent the Member State concerned."*

[621] *Ibid.,* Art. 5.11. *"5.11 In accordance with Article 19 of the ASEAN Charter, Representatives participating in official activities of the AICHR shall enjoy such immunities and privileges as are necessary for the exercise of the functions."*

end, the AICHR shall closely consult, coordinate and collaborate with such bodies in order to promote synergy and coherence in ASEAN's promotion and protection of human rights.[622] Within this framework, AICHR shall work within three pillars of ASEAN, namely ASEAN Politic and Security Community, ASEAN Economic Community and ASEAN Social and Culture Community. Marriage falls within the scope of protection to the human rights of women and children under the pillar of ASEAN Commission for the Promotion and Protection of the Rights of Women and Children (ACWC).

Besides the inauguration of AICHR, ASEAN also has a commission of human rights in particular for equality gender and protection of the rights of women and children referred to as the ASEAN Commission for the Promotion and Protection of the Rights of Women and Children, also known as the "**ACWC**".[623] This commission is a manifestation of platform similarity of ASEAN Member States after the ratification of the International Convention on the Elimination of All Forms of Discrimination against Women, known as the "CEDAW" and the Convention on the Rights of the Child, known as the "**CRC**".

2.2.3 ASEAN Commission on the Rights of Women and Children (ACWC)

The ASEAN Commission on the Promotion and the Protection of Women and Children, hereinafter referred to as the "**ACWC**", was established in the framework of the third pillars of One ASEAN Community. It is stated in the second point that *"...An inclusive community that promotes a high quality of life, equitable access to opportunities for all and promotes and protects human rights of women, children, youth, ..."*. In addition to that, the fact that the Member States of ASEAN have ratified and are parties to the Convention on the Elimination of All Forms of Discrimination Against Woman (CEDAW), hereinafter referred to as the "CEDAW" and the Convention on the Rights of the Child (CRC), hereinafter referred to as the "CRC", became the background of ACWC's establishment.[624]

ASEAN first call for this commission was in the 2004 Vientiane Action Programme. In 2009, this Commission was included as part of ASEAN's community-building plan, namely the "Roadmap for the ASEAN Community (2009-2015)", which includes the

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[622] *Ibid.,* Art. 6.9. *"The AICHR shall work with all ASEAN sectoral bodies dealing with human rights to be expeditiously determine the modalities for their ultimate alignment with the AICHR. To this end, the AICHR shall closely consult, coordinate and collaborate with such bodies in order to promote synergy and coherence in ASEAN's promotion and protection of human rights."*

[623] ACWC, Terms of Reference, Art. 1.1. *"All ASEAN Member States have ratified and are parties to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention of the Rights of the Child (CRC)."* See also the official website of ACWC, available at https://acwc.asean.org/about/, last access on June 27, 2017.

[624] ACWC, *Loc. Cit.*, Art. 1.2 -1.4. See also Association of Southeast Asian Nations, *Terms of Reference of ASEAN Commission on the Promotion and Protection of the Rights of Women and Children,* (Jakarta: ASEAN Secretariat, 2010), p. 5.

ASEAN Political Security Community (APSC) Blueprint and the ASEAN Socio-Cultural Community (ASCC) Blueprint that reiterate the establishment of an ASEAN Commission on the promotion and protection of the rights of women and children as an important measure to ensure equitable developments for women and children. In 2009, the ASCC Council endorsed ACWC's Terms of Reference (TOR) and the Commission was formally established on April 7, 2010.

The ACWC is an intergovernmental commission which comprises 20 representatives. Two representatives represent each member of ASEAN. Similar to AICHR, ACWC was established as a consultative body that was formed as an intergovernmental body and an integral part of ASEAN organization structure [625]

2.2.3.1 *Purposes of ACWC*

There are six objectives of ACWC described in its Terms of Reference. ACWC is established to promote and protect the human rights and fundamental freedom of women and children in ASEAN, by taking into consideration its particular context in the region and the balances between rights and responsibilities. It is about to uphold, protect and fulfill the rights of women and children in ASEAN to live in comfort as well as to promote the participation of women and children in the ASEAN Community. ACWS is about to enhance regional and international cooperation on the promotion and protection of the rights of women and children as prescribed by, among others, the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, CEDAW, CRC, and other international human rights instrument and regional declarations related to women's and children's rights to which the ASEAN Member States are parties. Lastly, ACWC is about to promote stability and harmony in the region, friendship and cooperation among the ASEAN Member States.[626]

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[625] ACWC, *Loc. Cit.*, Art. 4, 6. *"The ACWC is an intergovernmental body and an integral part of the ASEAN organisational structure. It is a consultative body."*

[626] *Ibid.*, Art. 2. *"2.1 To promote and protect the human rights and fundamental freedoms of women and children in ASEAN, taking into consideration the different historical, political, socio-cultural, religious and economic context in the region and the balances between rights and responsibilities. 2.2 To uphold, promote, protect, respect and fulfil the rights of rights of women and children in ASEAN to live in peace, equality, justice, dignity and prosperity. 2.3 To promote the well-being, development, empowerment and participation of women and children in the ASEAN Community building process which contribute to the realization of the purposes of ASEAN as set out in the ASEAN Charter. 2.4. To enhance regional and international cooperation with a view to complementing national and international efforts on the promotion and protection of the rights of women and children. 2.5. To uphold human rights as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration of Human Rights, the Vienna Declaration and Programme of Action, CEDAW, CRC, Beijing Platform for Action (BPFA), World Fit for Children, International Humanitarian Law and other international human rights instruments and regional declarations related to women's and children's rights to which ASRAN Member States are parties. 2.6 To promote stability and harmony in the region, friendship and cooperation among ASEAN Member States."*

From the purposes above, it is clear that ACWC is ultimately to promote and protect the human rights of women and children, the parties who are closed to marriage and some of the subjects of the family law, in particular in ASEAN region.

2.2.3.2 Principles of ACWC

In aiming its purposes and objectives, ACWC must be subject to and in line with the principles as determined agreed by the ASEAN Member States. In its terms of reference, there are nine principles of ACWC.[627]

ACWC is to respect for the principles of ASEAN as embodied in Article 2 of the ASEAN Charter, to respect for the human rights principles, including universality, indivisibility, interdependence, and interrelatedness of all fundamental freedoms and the rights of woman and children, the guiding principles of CEDAW and CRC. ACWC is also to respect for the principles of impartiality, objectivity, non-selectivity, non-discrimination and avoidance of double standards and politicization. ACWC is about to complement, rather than duplicate, the function of CEDAW and CRC Committees; and to recognize that the primary responsibility to promote and protect the fundamental freedoms and rights of woman and children rests with each Member State. It is also to pursue a constructive non-confrontational and cooperative approach to the enhancement of the promotion and protection of rights of women and children; while it also to pursue a balance between the functions of promotion and protection of the rights of women and children. ACWC also has the principles to adopt an evolutionary approach that will contribute to the realization of the rights of women and children in ASEAN, as well as to adopt a collaborative and consultative approach with the ASEAN Member States, academia and civil society pertaining to the rights of women and children.

Slightly different from IACHR, the TOR of ACWC mention that ACWC is to adopt a collaborative and consultative approach with ASEAN Member states, academia and civil society pertaining to the rights of women and children. Therefore, these TOR give

[627] *Ibid.*, Art. 3. *"3.1 To respect for the principles of ASEAN as embodied in Article 2 of the ASEAN Charter. 3.2 To respect for human rights principles, including universality, indivisibility, interdependence and interrelatedness of all fundamental freedoms and the rights of women and children, the guiding principles of CEDAW and CRC. 3.3 To respect for the principles of impartiality, objectify, non-selectivity, non-discrimination and avoidance of double standards and politicization. 3.4 To complement, rather than duplicate, the function of CEDAW ad CRC Committees. 3.5. To recognise that the primary responsibility to promote and protect the fundamental freedoms and rights of women and children rests with each Member State. 3.6 To pursue a constructive non—confrontational and cooperative approach to enhance the promotion and protection of rights of women and children. 3.7 To ensure a balance between the functions of promotion and protection of the rights of women and children. 3.8 To adopt an evolutionary approach that would contribute to the realization of the rights of women and children in ASEAN. 3.9 To adopt a collaborative and consultative approach with ASEAN Member States, academia and civil society pertaining to the rights of women and children."*

chances for academicians to elaborate approaches to protect the rights of women and children, in this particular case, the right to marry.

2.2.3.3 Mandates and Functions of ACWC

ACWC is mandated, among others, to promote the implementation of international and ASEAN instrument on the rights of women and children, to develop policies, programs and innovative strategies to promote and protect the rights of women and children to complements the building of the ASEAN Community; as well as to promote public awareness and education of the rights of women and children in ASEAN.[628]

ACWC is mandated to advocate on behalf of women and children, especially the most vulnerable and marginalized, and encourage ASEAN Member states to improve their situation. It is also delegated to build capacities of relevant stakeholders at all levels, e.g. administrative, legislative, judicial, civil society, community leaders, women and children machinery, through the provision of technical assistance, training and workshops, towards the realization of the rights of women and children.

In relation to CEDAW and CRC, ACWC is assigned to assist, upon request by the ASEAN Member States, in preparing for CEDAW and CRC Periodic Reports, the

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[628] *Ibid.*, Art. 5. *"5.1 To promote the implementation of international instruments, ASEAN instruments and other instruments related to the rights of women and children. 5.2 To develop policies, programs and innovative strategies to promote and protect the rights of women and children to complement the building of the ASEAN Community. 5.3 To promote public awareness and education of the rights of women and children in ASEAN. 5.4 To advocate on behalf of women and children, especially the most vulnerable and marginalised, and to encourage ASEAN Member States to improve their situation. 5.5 To build capacities of relevant stakeholders at all levels, e.g. administrative, legislative, judicial, civil society, community leaders, women and children machineries, through the provision of technical assistance, training and workshop, towards the realisation of the rights of women and children. 5.6 To assist, upon request by ASEAN Member States, in preparing for CEDAW and CRC Periodic Reports, the Human Rights Council's Universal Periodic Review (UPR) and reports for other Treaty Bodies, with specific reference to the rights of women and children in ASEAN. 5.7 To assist, upon request by ASEAN Member States, in implementing the Concluding Observations of CEDAW and CRC and other Treaty Bodies related to the rights of women and children. 5.8 to encourage ASEAN Member States on the collection and analysis of disaggregated data by sex, age, etc., related to the promotion and protection of the rights of women and children. 5.9 To promote studies and research related to the situation and well-being of women and children with the view to fostering effective implementation of the rights of women and children in the region. 5.10 To encourage ASEAN Member States to undertake periodic reviews of national legislations, regulations, policies, and practices related to the rights of women and children. 5.11 To facilitate sharing of experiences and good practices, including thematic issues, between and among ASEAN Member States related to the situation and well-being of women and children and to enhance the effective implementation of CEDAW and CRC through, among others, exchange of visits, seminars and conferences. 5.12 To propose and promote appropriate measures, mechanisms and strategies for the prevention and elimination of all forms of violation of the rights of women and children, including the protection of victims. 5.13 To encourage ASEAN Member States to consider acceding to, and ratifying, international human rights instruments related to women and children. 5.14 To support the participation of ASEAN women and children n dialogue and consultation processes in ASEAN related to the promotion and protection of their rights. 5.15 To provide advisory services on matters pertaining to the promotion and protection of the right of women and children to ASEAN sectoral bodies upon request. 5.16 To perform any other tasks related to the rights of women and children as may be delegated by the ASEAN leaders and Foreign Ministers."*

Human Rights Council's Universal Periodic Review (UPR) and reports for other Treaty Bodies, with specific reference to the rights of women and children in ASEAN; as well as to facilitate the sharing of experience and good practices, including thematic issues, between and among ASEAN member states related to the situation and well-being of women and children and to enhance the effective implementation of CEDAW and CRC through, among others, exchange visits, seminars and conferences.

ACWC is delegated to encourage the ASEAN Member States on the collection and analysis of disaggregated data by sex, age, etc., related to the promotion and protection of the rights of women and children. ACWC is about to promote studies and research related to the situation and well-being of women and children with the view to foster effective implementation of the rights of women and children in the region. It is also to encourage the ASEAN Member States to undertake periodic reviews of national legislations, regulations, policies, and practices related to the rights of women and children, as well as to propose and promote appropriate measures, mechanism and strategies for the prevention and elimination of all forms of violation of the rights of women and children, including the protection of victims.

Furthermore, ACWC is authorized to encourage the ASEAN Member States to consider acceding to and ratifying, international human rights instruments related to women and children, to support the participation of ASEAN women and children in dialogue and consultation processes in ASEAN related to the promotion and protection of their rights. Along with such tasks, it is also delegated to provide advisory services on matters pertaining to the promotion and protection of the rights of women and children to ASEAN sectoral bodies upon request. Lastly, ACWC is about to perform any other tasks related to the rights of women and children as may be delegated by the ASEAN leaders and Foreign Ministers.

In performing its tasks and functions, ACWC shall coordinate with the ASEAN Intergovernmental Commission on Human Rights (AICHR) and other relevant ASEAN sectoral bodies dealing with issues pertaining to women and children including consultation on the ultimate alignment between ACWC and AICHR as the overarching human rights institution in ASEAN. ACWC shall engage in dialogue and consultation, as may be appropriate, with other national, regional and international institutions and entities concerning the promotion and protection of the rights of women and children.[629]

2.3 ASEAN legislature competence: the "ASEAN Way"

The process of creating and promoting regional integration is mostly influenced by the visions or on how the ASEAN Member States were developed and integrated. ASEAN

[629] *Ibid.,* p. 14.

has been established to have the intergovernmental characteristics for security reasons. These intergovernmental character and reason have led the association using a political instead of legal process in dealing the ASEAN issues.

The process above established the creation of diplomatic channels or informal consultation or known as the ASEAN way. It is the traditional principle of non-interference of the ASEAN Member States that governments can endeavor to influence each other's conduct by informal meetings, consultation (*musyawarah*) to reach the consensus (*mufakat*). This system also applies when the ASEAN Member States are in settlement of any dispute, some scholar mentioned it as the method of non-confrontation or avoiding confrontation.[630]

ASEAN Way applies and improves concurrently with the development of ASEAN itself. During its appliance, there are some opinions of the ASEAN Way. Some scholars mention that it does not favor the development of ASEAN because in the event that one member disagrees then the resolution shall not be resolved. On the other side, some scholars mention that the ASEAN Way actually beholds the view of the prominent figure of the ASEAN Leader at that time and sometimes does not consistent with the facts. The recent ideas from the ASEAN observers are to revise the mechanism of resolution within the ASEAN Member States. The advice is about to reaffirm the resolution through majority mechanism.

Some researchers' source presents the comparison of ASEAN and EU in relation to the cooperation among its member states.[631] The comparison is made in order to learn on how to develop and enable efficient cooperation among the ASEAN Member States in establishing the vision of One ASEAN Community. The comparison is made because EU is considered as a regional cooperation that has a real form. EU has a concept that in the global and integration era, which involves and deals with many states, the regional power needs to be taken into consideration for ruling the national level. In providing more power to the regional level, the sovereign power of each nation, in a certain manner and a certain degree, should be shifted to the association. Therefore, EU established its supranational institutions to facilitate domestic and regional interests which will benefit all member states. EU has European Central Bank, European Parliament and a Court of Justice. Yet, the governments and its authorized institutions remain the significant actors in EU context. The relation amongst the EU members can involve civil relation, and upon those matters are regulated by the PIL provision issued by the EU Commission,

[630] Logan Masilamani and Jimmy Peterson, *The "ASEAN Way": The Structural Underpinnings of Constructive Engagement,* in *Foreign Policy Journal, October 15, 2014.* See also Amitav Acharya, *Culture, Security, Multilateralism: The ASEAN Way and Regional Order,* in *Contemporary Security Policy*, pp. 56-67.

[631] Laurence Henry, *The ASEAN Way and Community Integration: Two Different Models of Regionalism,* European Law Journal, Vol 13, No. 6, November 2007, pp. 857-879.

except the family law. Although nowadays EU is facing Brexit, the author cannot put aside the comparison because it does not waive the fact that EU has achieved a realization of its cooperation in a certain or particular way.

The author sees the comparison above as a necessary investigation in exploring an effective and efficient form of cooperation. The author agrees that ASEAN can learn something from EU. In considering or adopting the positive points of EU cooperation, at least, there are two backgrounds why ASEAN should re-contemplate. First, the legal system of the ASEAN Member States. The ASEAN Member States inherited certain legal systems of EU member states due their history. The legal systems have developed significantly pursuant to the social culture, in general, the condition of the local society within ASEAN Member State in particular. Therefore, the development of the legal system is not identical with the original states. For instance, Indonesia adopted the civil code from the Netherlands. The civil code further developed side by side with the customary law in Indonesia, while Indonesia also enacted several acts in relation to the economic law according to the Indonesian National Legislation Program (*Program Legislasi Nasional – "Prolegnas"*).[632] In another ASEAN Member States, namely Malaysia and Brunei Darussalam, the Syariah law (rules and regulations that rooted from Islamic values) develops besides the regulations it has from the past.[633]

Second, the purposes and objectives of ASEAN and the EU are different. The EU was started to establish the European Economic Community based on the Treaty of Maastricht in 1957. It has a supranational body. While ASEAN was started as a security cooperation, and it is an intergovernmental cooperation. All of the ASEAN Member States have an equal position and no supranational body above them. The comparison in the economic area is reasonable and necessary. Bearing in mind that EU is a success of economic integration and the economic area is a non-sensitive area compared to the family law, the comparison shall result in necessary and beneficial feedback for the

[632] See the development of the Indonesian Economic Law which rapidly started around 1970s in Muchtar Kusumaatmadja, *Fungsi dan perkembangan Hukum dalam Pembangunan Nasional* (Bandung: Binacipta, 1970), CFG Sunaryati Hartono, *Hukum ekonomi Pembangunan Indonesia* (Bandung: Binacipta, 1988), Rachmat Usman, *Hukum ekonomi Dalam Dinamika,* (Jakarta: Djambatan, 2000), Sumantoro, *Hukum Ekonomi (Economic Law)* (Jakarta: Universitas Indonesia Press, 2008). See also the development Syariah Law in Indonesia, Suhrawardi K. Lubis and Farid Wajdi, *Hukum Ekonomi Islam* (Jakarta: Sinar Grafika, 2012), Gemala Dewi, *Aspek-aspek Hukum Dalam Perasuransian Syariah di Indonesia* (Depok: Jakarta Putra Grafika, 2004).

[633] Andrew Harding and Dian Shah (Ed.), *Law and Society in Malaysia: Pluralism, Religion and Ethnicity* (Oxon: Routledge, 2018), Siti Khadijah Ab. Manan, Fadilah Abd. Rahman, Mardhiyyah Sahri (eds.), *Contemporary issues and Development in the Global Halal Industry: Selected Papers from the International Halal Conference 2014* (Singapore: Springer, 2016). For comparison of Syariah Law in Malaysia, Brunei and Singapore, see Kerstin Steiner, *Comparative in Syariah Courts, A Case Study of Singapore, Malaysia, and Brunei* in Mads Andenas and Duncan Fairgrieve (Eds.) *Courts and Comparative Law,* (Oxford: Oxford University Press, 2015).

ASEAN Economic Community.[634] Yet, adjustment due to the uniqueness of ASEAN is a must.

2.3.1 ASEAN Way: Non-interfere, non-confrontation, *Musyawarah* and *Mufakat*

The "ASEAN Way" is appreciated as the culture of working atmosphere amongst the ASEAN Member States and one of the decision-making processes within ASEAN. ASEAN Member States have followed the ASEAN Way in relations among the member states, because amongst them, it is the friendly and accepted approach as part of the history and culture. This sub-chapter is developed to review whether or not the "ASEAN Way" can smooth the process of harmonizing or unifying the marriage laws amongst the ASEAN Member States.

The underlying approach is the consensus approach, embodied in the Indonesian and Malaysia languages which rooted from the Malay language as "*Musyawarah*" or consultation and "*Mufakat*" or consensus. *Musyawarah* is known as the process of decision-making through discussion and consultation by all of the relevant parties or by their valid representatives. *Mufakat* is a unanimous decision achieved by an approach associated by traditional means to have a decision in the region. This decision-making process is believed as a traditional approach and has played a role in village politics for centuries, and as part of the culture, it can be identified as part of the regional system.[635] Both terms rely on patient consensus building to arrive at the same understanding or agreement. In the sense that it is consensus and a kind of approach, some scholars are of the opinion that it constitutes informal or loose agreement.[636]

The concept of *musyawarah* and *mufakat* involves processes including an intensive informal and discreet discussions behind the scenes. These consultative actions become the starting point to approach any counterpart for a discussion if any contradicting or different opinion or even asking advice before it goes to an open discussion on a round table or become an agenda in a formal discussion. After the informal and friendly discussion, a general consensus which is a unanimous decision is finally accepted in

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[634] There are several comparisons described in an academic writing between ASEAN and EU in relation to economic cooperation. For instance, Thahja Kusumo Wardhono. *Establishing an Integrated Payment System (Real-Time Gross Settlement) in ASEAN, A proposal for a Cross Border Payment Mechanism to Support the AEC 2015.* Groningen, Ulrik Huber Institute for Private International Law, 2015. Ida Susanti. *The Conflict Rules on the Protection of the rights of migrant workers.* Dissertation. Groningen, Ulrik Huber Institute for Private International Law, 2008. Aan Khee-Jin Tan, *The proposed EU –ASEAN Comprehensive Air Transport: What might contain and can it Work?* Transport Policy, Vo.43, October 2015, pp. 76-84. Asian Development Bank Institute, *ASEAN 2030: Toward a Borderless Economic Community* (Tokyo, Japan: Brooking Institution Press, 2014).

[635] *Ibid*., p. 167. See also *Puspha Thambipillai and J. Saravanamuttu, ASEAN Negotiations – Two Insights,* (Singapore: ISEAS, 1985), pp. 10-13.

[636] Paul J. Davidson, *The ASEAN Way and the role of law in ASEAN Economic Cooperation,* in the *2004 Singapore Year Book of International Law and Contributors,* p. 166.

more formal meetings. This concept is considerably different from the across-the-table negotiations involving bargaining and give-and-take that result in deals enforceable in a court of law.

The ASEAN way relies on a significant portion of personal and or informal approach, in contradiction with the western ways of dependence on structures and their functions. The way of making regional decisions dealing with cooperation among member States adopted by ASEAN reflects its attitude refusing to become a supranational body above the ASEAN Member States. ASEAN puts emphasis on the use of conciliation and mediation, the resolution of which will be an agreement instead of an award that can be enforced to the involved parties.[637]

The "ASEAN Way" entails behavioral norms condensed in the code-of-conduct and a set of procedural norms. The former contains standard norms of international law: respect for sovereignty and non-interference in internal affairs, peaceful resolution of conflicts, and non-use of force. In relation to the foreign policy, the ASEAN leaders are expected to follow the ASEAN Way namely through "*musyawarah*" and "*mufakat*". Together with a proclivity for informality and non-confrontational behavior. This decision-making system is designed to prevent the majority or the most powerful from imposing their views on the whole group. The process is characterized by informality, and it serves to forge a general consensus that accommodates the different viewpoints of all parties before a formal decision is made.

The consensus norms transcend the sphere of the policy process. It affects policy outcomes, as the final result of the decision-making process is supposed to reflect the sensitivities of all parties.

For instance, in relation to the ASEAN economic market, ASEAN Member States prefer to have the "relationship-based" way of doing business[638] This situation raised suggestion that East Asian countries must move away from such approach to creating wealth to one that is more "rules-based" and "market driven." Yet, nowadays the economic development in ASEAN has been based on the cooperation rather than integration through law. ASEAN has made a leap from cooperation to integration which expects more binding undertakings. As levels of integration grow, the binding character of liberating agreements becomes more important and as levels of obligation and

[637] For instance, it is stated that in point 15 of the Joint Press Statement of the 9th ASEAN ASLOM 23-24 August 2004, Brunei Darussalam, that *"The 9th ASLOM discussed and agreed that there can be continuing exchange of views and experiences between ASEAN Member Countries on the harmonization of intellectual property rights, trade laws, legal cooperation in alternative dispute resolutions such as conciliation and mediation and on ways to streamline that procedures for the legalization of documents."*

[638] H.E. Rodolfo C. Severino, Jr. ASEAN Secretary-General, "Reforms and Integration in East Asia Could Strengthen Regional Stability" (14 August 1999), available at ASEAN Official Website; http://www.aseansec.org/golek.html, last accessed on December 13, 2016.

precision increase, a delegation of rule interpretation and dispute adjudication is often observed.

In relation to marriages, the author sees that the process of the ASEAN Way can be applied in negotiations and or informal meetings. A friendly approach can be done to each of ASEAN Member States asking them to consider their regulations to be unified and or harmonize with another. Requesting a discussion, seminar, or thematic issue with academic reviewers, legal professionals or others can be made. Yet, in relation to the substantive provisions of marriage, the approach should be different. As marriage is a legal event of a couple and related to the legal status of a person, consequently a legal approach is also required. In order such marriage to be recognized or acknowledged, multilateral or bilateral agreement or convention amongst the ASEAN Member States is required. Therefore, the approach can be friendly, although the substance of marriage requires otherwise.

2.3.2 Hard law vs. Soft law in ASEAN: which way forward ?

The results of comparison of ASEAN to EU by the researchers show different outcomes.[639] In relation to cross-border migrant workers and labors, it propose that ASEAN might enter into a treaty or pact among the member States. In other words, it suggested that the ASEAN Member States apply the hard law. In relation to a cross-border payment mechanism, it is proposed to adopt a soft law with amicable dispute settlement mechanism instead of an arbitral or a court.[640]

The hard law on this matter refers to legally binding rights and obligations that are precise or can be made precise, through adjudication or the highly or detailed regulations, and that delegate authority for interpreting and implementing the law. By using the hard law to order the relations, the states reduce transaction costs, strengthen the credibility of their commitments, expand their available political strategies, and

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[639] There are some articles about the comparison of EU and ASEAN, among others in relation to "the actor" in international relation. See Jens-Uwe Wunderlich, *The EU an Actor Sui Generis? A comparison of EU and ASEAN Actorness* in Journal of Common Market Studies 2012 Vol. 50, No. 4, pp. 653-669. The EU and ASEAN behave as the international actors and both are being recognized as such. The UE favored a highly institutionalized structure characterized by legally enforceable rules. ASEAN can be characterized as developmental states in political and economic terms, and this goes a long way toward explaining ASEAN's version of institutionalization and its avoidance of supra-nationality. In cultural projects, see Manuel Enverga III, *Comparing ASEAN and the EU's implementation of Cultural Projects: A Historical Institutionalist Analysis* in Asia Europe Journal 2018, No. 16, pp. 65-80.

[640] See research of Ida Susanti which suggests to employ the hard law through agreements between the states. See Ida Susanti, *Op. Cit.*, pp. 263-268. While Dwi Tjahja suggests to employ the amicable settlement or negotiation and if fail, the alternative dispute resolution. Although he suggests more that ASEAN should empower the dispute settlement body as a proper judicial body. See also Dwi Thahja Kusumo Wardhono, *Op. Cit., pp.* 213-222. The latter comparison also covers MERCOSURE, the regional cooperation in Latin America region.

resolve problems of incomplete contracting. However, it entails significant cost: hard law restricts the state behavior and even their sovereignty.[641] Soft law in this discussion shall be understood on the legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation. This softening can occur in varying degrees along each dimension and in different combinations across dimensions.[642]

The use of soft law offers many benefits. Some consider that it is an attractive policy preference and not merely as the second-best option for the hard law. The soft law is flexible in any circumstances and promotes mutual learning of norms where internalization of hard law may be difficult. Soft law, as a non-legally binding device, carries persuasive force that can influence member state to voluntarily do things that they might not do if it is in the form of hard obligation.[643]

If the leaders would like to use the hard law form, they have to spend more time and political efforts that entail state ratification and bureaucratic review. The softer law offers the trade-off of less formalized law, but with much lower costs to set up the agreement in the first place. Legal agreements can limit state sovereignty that limits the freedom to act of the member states. In this case, the international agreements limit the state control over both its external and domestic affairs. It is reasonable if states are unwilling to limit their sovereignty unless they have exceptional or good reason to do so. If they believe that they will gain more from the law than it has to lose, they will do it willingly. The soft law provides a way to enter into a relationship while still protecting a state's sovereignty.[644]

Notwithstanding some scholars' opinion that the soft law is an inadequate device and is operated by the developing countries as a shield for the weak,[645] soft law does something that hard law cannot do.

From the beginning, ASEAN has a unique characteristic which is regarded as a lack of binding arrangements because of reliance on informal meeting and consensus mechanism. The way to achieve an agreement is more by way of *musyawarah* (negotiation) dan *mufakat* (consensus) rather than by the court of formal decision, known as the "ASEAN Way". ASEAN has made progress in an ASEAN manner, not through rules and regulations, but through *musyawarah* (negotiation) dan *mufakat*

[641] Kenneth W. Abbot and Duncan Snidal, *Hard and Soft Law in International Governance,* International Organization, Vo.54 No. 3, Legalization and World Politics (Summer, 2000), pp. 421-456.

[642] *Ibid.*

[643] Imelda Dienla, *the Development of the Rule of Law in ASEAN: The State and Regional Integration,* Cambridge (UK; New York: Cambridge University Press, 2017), pp. 66-69.

[644] *Ibid.,* pp. 436-441.

[645] Kenneth W. Abbot and Duncan Snidal, *Op.Cit.*, pp. 447.

(consensus). They have made a habit of working together and of consulting each other over common problems because it is the common culture in ASEAN.[646]

In relation to the legal instruments, ASEAN has improved rapidly by having it explicitly stated in the ASEAN Charter, namely declarations, agreements, conventions, concords, and treaties. Moreover, other legal terms have also been used besides those stated in the Charter, for instance, as Joint Communique, Memorandum of Understanding, Memorandum of Cooperation and Protocol.

When ASEAN made a legal instrument for attaining its aims, it can be categorized into two types of legal instruments. The first category is known as the "hard law". This kind of instruments has a direct binding effect such as charter, agreement, protocol, convention and treaty. The second category is the soft law, which known as a non-binding instrument, for instance, the declaration and the Memorandum of Understanding. The binding of that instrument is through the moral force.[647] In comparison of the two devices, it appears that the hard law is more favorable for legal certainties than the soft law.

ASEAN, according to the author's observation, prefers to use the soft law at the beginning of agreements before it develops its shape and metamorphosis into another legal instrument which has stronger legal binding. The time spent during such period to reach mutual understanding can be reassessed over time. It has been attested from the ASEAN Declaration, known as the Bangkok Declaration 1967 that the ASEAN Leaders affirmed their commitments to cooperation for regional interests. Forty years later, in 2007, some issues had been adopted in the ASEAN Charter and become a legally binding instrument. This is suitable for the political situation in that era whereby "informal resolution" was best for the situation at that time. With this device, ASEAN has achieved the ability to maintain peace and security in the region.

Nowadays, ASEAN is implementing the vision of ASEAN One Community. The process of integrating of the hard law in its legislation and each member States becomes the critical stepping point. This is reasonable according to the author, at least, for three reasons. First, the creation of a single market in the framework of AEC will give people

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[646] Lee Kuan Yew, *Opening Address in Joint Communique of the Fifteenth ASEAN Ministerial Meeting* in Singapore, June 14-16, 1982, available on the official website of ASEAN at http://asean.org/joint-communique-of-the-fifteenth-asean-ministerial-meeting-singapore-14-16-june-1982/ , last accessed on July 3, 2017. See Geoffrey B. Cockerham, *Regional Integration in ASEAN: Institutional Design and the ASEAN Way* in East Asia (2010) 27, pp. 165-185.

[647] The Universal Declaration on Human Rights (UDHR) was adopted by the United Nations General Assembly in 1948. Eighteen years later, in 1966, it was drafted into two treaties by the representatives of the governments sitting down together in the UN and agreed on making the treaties, i.e. the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). Since the covenants are drafted in international conventions, they become legally binding on states that agreed to become parties to it.

the freedom with no frontier to trade goods, invest their money and to enjoy it in conditions of security and justice accessible to all. Accordingly, they will need the rules of law to carry out and to protect their activities. Thus, they need policies and laws designed to unify the diverse national interest. They further need laws and regulations that govern and bind them and can be accepted and complied by all member states. Second, integration into one community is associated with international relations, thus entails the same standard, uniformity, and harmonization between the involved parties from member states which have a different legal system. Lastly, the ASEAN Charter provides a settlement of dispute clauses. This clause shows that ASEAN has taken a risk by setting out the dispute settlement clause in the Charter in order to strengthen the authority of the organization beyond national interests, although there was still lack of implementation in using this dispute mechanism. Nevertheless, these articles are expected to become a starting point to create more legally binding instruments that can enforce judgment effectively and efficiently.

The author observes that the ASEAN Charter provides both ways, the soft law by encouraging the amicable settlement through dialogue, consultation, negotiation, and mediation. It also provides the hard law by providing dispute settlement clauses which encourage the establishment of the hard law as a legal instrument. Some scholars such as Shafer and Pollack state that the interaction between hard law and soft law can complement each other. They state that these scholars contend that hard and soft law mechanism can build upon each other in two primary ways: (1) non-binding soft law can lead the way to binding hard law, and (2) binding hard law can subsequently be elaborated through soft-law instruments. In the EU, in its legal instruments, it uses both soft and hard law together to achieve maximum effectiveness, known as hybridity.

In relation to the situation above, ASEAN has used the first way. Before the ASEAN Charter was established, ASEAN has the ASEAN Declaration, known as the Bangkok Declaration 1967. The ASEAN Charter affirmed their commitment to cooperation for regional interests after forty years, in 2007. The soft law (Bangkok Declaration) transformed into the hard law (ASEAN Charter), finally.

At this moment, ASEAN seems to repeat the similar path in achieving the ASEAN One Community. ASEAN has its declaration in the form of soft law through its road maps, concord, or blueprint. After sometime or any necessary considerations and observations, it can be transformed into a hard law. In relation to this, the author would like to conclude in a broad sense that ASEAN tends to implement the soft law than the hard law. In other words, ASEAN has its own way in implementing the legal instruments which it considers fit or flexible enough to their needs. The hard law shall be a device afterwards when all of the member states are confident and convinced about the respective matters.

In relation to marriages, the author looks back to the substance of marriage as a legal event establishing a legal relationship between a couple that has an impact to any third parties. In the ASEAN one community, particularly in relation to marriages, a legal certainty that has legal binding effect to the parties wherever they go, is essential. In this part, ASEAN urges to agree on what kind of marriage they can acknowledge. Any recognition of such kind legal event and or legal relationship cannot be regulated through the soft law. Unification and or harmonization of marriage should ideally be implemented in a hard law instrument for legal certainty reason.

The center of community is a family wherever it is, in Europe, Africa or anywhere else, including ASEAN One Community. In relation to the legal relationship within a family, the protection over the family are provided in the family law. The family law that contains any foreign elements shall fall under the scope of the Private International Law or the Conflict of Laws. Therefore, the rules of Private International Law are strongly suggested for consideration and observation to fulfil the needs in the ASEAN One Community. Those considerations shall be more elaborated in Chapter 7.

An effort to observe a proper, suitable and acceptable form for the ASEAN needs can use the negotiation or informal approach as an initial step known as the ASEAN Way.

2.3.3 ASEAN competence in the field of international family law

Having discussed the objectives of ASEAN in the framework of the ASEAN One Community, at least there are two reasonable thoughts in achieving the ASEAN international family law. The human rights in ASEAN and the free movement of labors and workers in ASEAN. The thought of human rights can be found when we see the first and the third pillars, namely the ASEAN Political-Security Community and ASEAN Socio-Cultural Community. The thought of the right of free movement of labors and workers can be found in the framework of ASEAN Economic Community.

In the process to protect human rights, ASEAN agreed to establish the ASEAN Intergovernmental Commission on Human Rights. Besides such commission, ASEAN also establishes the ASEAN Commission on the Promotion and the Protection of Women and Children. These commissions are about to promote and protect the human rights and fundamental freedom. Yet, these commissions have no authority to formulate any rules and regulations which have legal binding and legal enforcement toward each of the ASEAN Member States. The same condition is observed on the right of free movement of labors and workers.

In the TOR of AICHR and ACWC, those commissions can promote, consult, engage a dialog pertaining to human rights and or the rights of women and children.[648] AICHR has the mandate and function to prepare studies on thematic issues of human rights in ASEAN.[649] ACWC can adopt a collaborative and consultative approach with the ASEAN Member States, academia pertaining to the rights of women and children.[650] With such mandate and the objective of ASEAN One Community, at least at this moment, an academic approach to a particular topic can be adopted.

2.3.4 Unification and or Harmonization of law amongst the ASEAN Member States

The establishment of the ASEAN One Community shall make interactions among legal systems of the ASEAN Member States. The movement or transactions of and among the ASEAN citizens within ASEAN region shall make such transaction and relation contain foreign elements. For instance, a sale and purchase transaction of an Indonesian company and a Malaysian company, or in another situation, a marriage between a Philippine citizen and a Singapore citizen, etc. As mentioned before, such transaction and relation shall fall into the scope of the Private International Law, hereinafter referred to as the "**PIL**".

The Private International Law (PIL) shall play an essential role in such kind of transactions and or relations. In this case, PIL shall assist, at least, in three ways: (a) determining the applicable law, (b) determining the forum which has the jurisdiction, as well as (c) the acknowledgment and enforcement of foreign judicial awards.

PIL seeks to regulate problems arising from the confluence of national legal systems. The primary purpose of PIL is that it seeks the efficient and equitable regulation of judicial matters complicated by diverse legal systems.[651] One of the great scholars named Friederich Carl Von Savigny has put a starting point for conflict of laws as we understand today, which is to apply the law that has the closest connection to the respective legal relation and or transaction.[652] PIL is intended to ensure relations containing foreign elements are not prejudiced by differences existing between legal

[648] ASEAN, TOR of AICHR, Loc. Cit., Art. 4; ASEAN, TOR of ACWC, Art. 5. See the explanation of AICHR and ACWC in sub-chapter 4.2.2.3 and 4.2.2.4 respectively.

[649] ASEAN, TOR of AICHR, Art. 4.12. *"4.12. To prepare studies on thematic issues of human rights in ASEAN."*

[650] ASEAN, TOR of ACWC, Art. 3.9. *"3.9. To adopt a collaborative and consultative approach with ASEAN Member States, academia and civil society pertaining to the rights of women and children."*

[651] M.H. ten Wolde and K.C. Heckel, "European private International Law: A Comparative Perspective on Contracts, Torts and Corporations", (Groningen: Ulrik Huber Institute for Private International Law, 2012), p. 22.

[652] *Ibid., p.* 10.

systems. The ultimate purposes are decisional harmony, creation of uniformity in determining the applicable law, and legal certainty.

In achieving a decisional harmony, PIL offers two efforts, namely unification and or harmonization of law. The unification and or harmonization can cover the choice of law rules, or substantive rules of private law. Both efforts are feasible and successful. The first effort can be seen in the Hague Conferences, while the second effort can be seen in conventions proposed by UNCITRAL.[653]

The unification of the choice of law or the substantive law thereby ensures that the same legal system governs a particular dispute wherever litigation may take place. Harmonization of the choice of law rules enables the same judicial award on the same case may be different. PIL rules can be different between the member states, yet the performance of the PIL rules of a case results in equal awards as if the same case is settled before the court of another member states. Those unification and harmonization leave no space for forum shopping.[654]

There are two arguments in favor of the unification and harmonization in ASEAN. Firstly, by the unification of choice of law, any legal relationship arising from a legal event, such as marriage, shall not require any further acknowledgement and recognition abroad. No further step is required, as the applicable law is the same one another. Secondly, unification of the choice of law rules promotes the compatibility of these rules better than harmonization. Harmonization of the choice of law rules leaves room for diverging decisions. Accordingly, unification of the choice of law rules shall result in equal and consistent judgment on any courts of different ASEAN Member States. No room for any risk of diverging decisions leads to a legal certainty.

In relation to the creation of the ASEAN One Community, the unification of PIL rules seems to be ideal. PIL scholars are of the opinion that unification of legal systems is a fairy tale. Even though it is achieved, PIL is still required to play its role as the qualification of each national legal system which remains different from one another.[655] Therefore, unification of laws seems beyond the limit to reach, but this thought is worth further endeavors. Although it is impossible, the question still remains: to what extent similarity(ies) between the ASEAN Member States exists and, if any, can be unified further. If similarity is not the case, what is the difference and how to find the solution?

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[653] C.F. Forsyth, *Private International La, The Modern Roman-Dutch Law Including the Jurisdiction of the High Court,* 4th Ed. (Lansdowne: Juta & Co. Ltd., 2003), pp. 49-52.

[654] *Ibid.*

[655] *Ibid.,* see also Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia,* (Bandung: Binacipta, 1987), p. 124. He quoted a PIL scholar, Bartin who in his dissertation, states though the unification of PIL rules amongst the nations occurs, the role of PIL is still required as the qualification of legal definitions and terminologies is different from one state to another.

In answering the question, a comparison of law between the ASEAN Member States will be undertaken in the next chapter.

3 Notes and Conclusions

1. ASEAN is developing to be more than political cooperation as when it was firstly established. Recently, ASEAN intensifies its cooperation in achieving its objective, namely the ASEAN One Community that has three pillars, APSC, AEC and ASCC. The steps and measurements in each pillar are described in the Roadmap of ASEAN One Community 2025.
2. In relation to this writing, ASEAN has reasons to unify or harmonize its marriage law. First, the free movement of labors and workers as the consequence of the establishment of AEC. Second, the acknowledgment of the right to marry is one of the ASEAN human rights in the framework of establishment of APSC and ASCC. The latter background is even more re-affirmed when ASEAN established its commission AICHR and ACWC particularly to promote and protect the rights of women and children.
3. In order to achieve the ASEAN One Community, it needs one rule and regulation amongst the ASEAN Member States to provide the legal certainty to cross-border transactions and relations.
4. ASEAN has one device, known as the ASEAN Way, namely non-interference, non-confrontation, consultation (*Musyawarah*) and consensus (*Mufakat*) in settling its affairs and or resolutions in its community. It is known as *Musyawarah* as the process of decision-making through discussion and consultation by all relevant parties or by their valid representatives. *Mufakat* is a unanimous decision achieved by an approach associated by traditional means to have a decision in the region. By this device, ASEAN tends to prioritize the soft law and its instrument than confirming such resolution as the transformation into in a hard law.
5. In relation to marriage, unfortunately, the device above shall not be used efficiently for both harmonization and unification. A marriage as a legal event shall require a hard law for the recognition and acknowledgment of marriage. It is for the legal certainty and legal protection to the involved couple and any third party. The ASEAN Way can be used in the term of approach to the unification purposes or at least gain more similarity between the member states.
6. The role of PIL as the rule that regulates cross-border transactions and relations is, without any doubt, essential.
7. PIL can help ASEAN in considering whether a unification of law can be achieved. If it is not the case, to what extent unification can be done and how. Further, ASEAN needs to see the harmonization of law. The similarity and

divergence between the legal system amongst the ASEAN Member States can be the start of work, thus the author continues to the next chapter.

Chapter 5:
Marriage Law
of ASEAN Member States

1 Marriage Law of ASEAN Member States

The culture and residents of ASEAN Member States vary. Each state has its own particular history and religious background. Indonesia has its various cultures and religions, while Malaysia and Brunei have Malay and Dayak cultures and their residents are predominantly Moslems. Thailand, Cambodia and Vietnam have their own culture while the residents are largely Buddhists. The Philippine has predominantly Christian residents. This diversity between the ASEAN Member States makes comparison amongst them challenging, yet interesting.

This chapter will describe the requirements for a marriage and its solemnization pursuant to the prevailing laws and regulations in each of the ASEAN Member States. Knowing that legal pluralism exists in most of the ASEAN Member States, describing all of the prevailing marriage laws is not an option. Therefore, only the marriage law at the national level or the marriage law of predominant residents will be described, and if necessary, an additional explanation will be added. Comparison with the Indonesian marriage law, as embodied in MA 1974 and its implementing regulations, will become a summary at the end of sub-chapter of a state. A particular issue, if any, as a result of comparison between Indonesia and the ASEAN Member States will be described to enrich the marriage law in Indonesia.

As the Indonesian marriage law has been presented in the preceding discussion, this chapter will describe the marriage law of the remaining states of ASEAN. It will cover ASEAN Member States, alphabetically, Brunei Darussalam, Cambodia, Lao People's Democratic Republic (Lao PDR), Malaysia, Myanmar, the Philippine, Singapore, Thailand and Vietnam.

1.1 Brunei Darussalam

In Brunei Darussalam, hereinafter referred to as "**Brunei**", there are three prevailing marriage laws. They are Marriage Act Chapter 76 which applies to Non-Moslems, the Chinese Marriage Act Chapter 126 which applies to a marriage according to Chinese laws or customs, and the Brunei Darussalam Moslem Family Law or *Undang-undang*

Keluarga Islam Brunei Darussalam under Chapter 217which applies to Moslems. The registration of marriage is stipulated in the Registration of Marriages Act.[656]

This sub-chapter will describe the marriage law for Moslems in Brunei Darussalam under Chapter 217, herein referred to as the "**Brunei Islamic Family Law**". Brunei Islamic Family Law applies to a marriage whereby at least one of the parties professes the Islamic religion and at least one of the parties, whether or not the one who professes the Islamic religion, is in a *bermukim* (means residing without the intention to *bermastautin* in a certain area whilst not being a traveler) manner in Brunei or is *bermastautin* (means permanently or ordinarily residing in a certain area) in Brunei but in a *bermukim* manner outside Brunei.[657]

1.1.1 Definition of Marriage

The Brunei Islamic Family Law has no provision on the definition of marriage. The marriage law in Brunei is based on the Islamic Law that is guided mainly by the principles in the Holy Qur'an and the prophet's tradition or Hadiths as well as other resources of Law in Islam, which include *Ijma*, or consensus of opinion, *Qiyas* or analogical deduction, etc.[658] Therefore, it can be concluded that the concept of marriage in Brunei is the same as the concept of marriage in Islam.

A marriage, in the Marriage Act Chapter 76, is defined as the voluntary union of life of one man with one woman to the exclusion of all others until it is dissolved by a court of competent jurisdiction.[659]In the Chinese Marriage Act, it is stated that a Chinese marriage is a marriage contracted according to the established Chinese law or custom and includes a marriage constituted by the marital intercourse of persons betrothed

[656]Brunei Darussalam, Marriage Act Cap.76, available at www.agc.gov.bn/AGC%20Images/LAWS/ACT_PDF/cap076.pdf ; Chinese Marriage Act Cap.126, available at www.agc.gov.bn/AGC%20Images/LAWS/ACT_PDF/cap126.pdf; Brunei Islamic Family Law, Cap.217. www.agc.gov.bn/AGC%20Images/LAWS/ACT_PDF/cap217.pdf;Registration of Marriages Act Cap.124, available at www.agc.gov.bn/AGC%20Images/LOB/PDF/Cap124.pdf

[657] Art.5 of the Brunei Islamic Family Law. *"(1) Notwithstanding any contrary provisions in any written law, this Act shall apply in any matter in which at least one of the parties professes the Islamic religion and at least one of the parties, whether or not he professes the Islamic religion, is in a* bermukim *manner in Brunei Darussalam or is* bermastautin *in Brunei Darussalam but in a* bermukim *manner outside Brunei Darussalam. (2) For the avoidance, it is hereby declared that no Court other than a Court established under Part II of the Syariah Courts Act (Chapter 184) shall hear or determine any claims or proceedings where at least one of the parties is a Muslim and related with any matters arising in this Act."*

[658] "*Legal Systems in ASEAN, Brunei Darussalam*", Chapter 2, pp.2, available at http://www.aseanlawassociation.org/papers/Brunei_chp2.pdf, accessed on July 22, 2016.

[659] Brunei Darussalam, Marriage Act, Art.2. *"2. (Interpretation) … "marriage" means a marriage as understood by English law, that is, the voluntary union for life or until the marriage dissolved by a court of competent jurisdiction of one man with one woman to the exclusion of all others; …"*

according to such law or custom.[660]Both of the definitions state that a marriage is a union or contract between two persons exclusively. It shows that the emphasis of marriage is the relation between the two persons than having descendants.

1.1.2 Capacity to Marry

1.1.2.1 Consent of the parties to a marriage

A marriage shall be void and shall not be registered unless parties to the marriage have consented.[661] Consent from each party must be given on voluntary basis. Consent to marry from each party must be free from duress, mistake, and unsoundness of mind. Any existence of duress, mistake, and unsoundness of mind when a bride gives her consent to enter into a marriage shall be grounds for annulment or *fasakh*[662].

1.1.2.2 Monogamy

A polygamous marriage is allowed in Brunei provided that a groom has prior permission to do so from a *Syar'ie* Judge[663]. If a man re-marries at any place during the subsistence of his marriage without obtaining prior written permission from a *Syar'ie* Judge, he is convicted as guilty of an offense and is liable for conviction to a fine, imprisonment not exceeding 6 months or both.[664]

The Brunei Islamic Family Law stipulates that no woman shall, during the subsistence of her marriage to a man, be married to another man. A woman must be single, and if

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[660] Brunei Darussalam, Chinese Marriage Act, Art.2. *"2. In this Act and any rues made thereunder – "Chinese marriage" means a marriage contracted according to established Chinese law or custom and includes a marriage constituted by the marital intercourse betrothed according to such law or custom."*

[661]*Ibid.,* Art.12. *"A marriage shall be void and shall not be registered under this Act unless both parties to the marriage have consented thereto, and either – (a) the* wali *of the woman has consented thereto in accordance with* Hukum Syara'*; or (b) a* Syar'ie *Judge having jurisdiction in the place where the woman in* bermastautin *or any person generally or specially authorised in that behalf by the* Syar'ie *Judge has, after due inquiry in the presence of all parties concerned, granted his consent thereto as* wali *Hakim in accordance with* Hukum *Syara'. Such consent may be given if the* wali *cannot be found or if the* wali *refuses to give his consent without reasonable grounds."*

[662]*Fasakh* means the annulment of a marriage by reason of any circumstances as permitted by the *Syara'* Law, among others circumstances stated in Art.46 of the Brunei Islamic Family Law. *"(1) A person married in accordance with* Hukum *Syara' shall be entitled to apply in the prescribed form for an order for the dissolution of marriage by way of* fasakh *on any one or more of the following grounds - … (i) that the wife did not consent to the marriage or her consent was not valid, whether as a consequence of duress, mistake, unsoundness of mind, or any other circumstances in accordance with* Syara' *Law; …"*

[663]*Ibid.,* Brunei Islamic Family Law, Art.2. *"*Syar'ie *Judge means a* Syar'ie *who has been appointed according to the prevailing rules and regulations to adjudicate the cases before the* Syariah *Courts pursuant to the* Syara' *Law."*

[664]*Ibid.,* Art.123. *"A man who remarries at any place during the subsistence of his marriage without obtaining prior written permission from a* Syar'ie *Judge is guilty of an offence and liable on conviction to a fine not exceeding S2,000, imprisonment not exceeding 6 months or both."*

she is a *janda* (means a woman who has been divorced with or without consummating her marriage), she may re-marry after the elapse of *iddah* period to any man other than the man from whom she last divorces. She shall not be married unless she has given her clear consent and after she has produced a valid certificate of divorce. If divorce is considered as *baain kubra*(means three *talaq,* the last category of Islamic divorce)*,* she shall not re-marry her previous husband, unless she has been lawfully married to another person and that marriage has been consummated and later lawfully dissolved and the *iddah* period has expired. An *iddah* period means the duration or period as of her marriage dissolution, in which a woman is prohibited from re-marrying, usually the period of three-time menstruation as proof that the woman is not pregnant.[665]

When a woman alleges that she is divorced before a marriage has been consummated, she shall not, during the *iddah* period for an ordinary divorce, marry any person other than her previous husband, except with the permission of *Syar'ie* having jurisdiction in the place where she is *bermastautin*.[666]

If a woman is a widow, she shall not marry any man at any time prior to the expiration of the *iddah* period; and she shall not marry unless she has produced a certificate of death of her late husband or otherwise has proven his death.[667]

If a woman has been pronounced divorced or *fasakh* by a court and the matter has been referred to the Court of appeal, she shall not marry another man pending a decision of the Court of appeal.[668]

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[665] *Ibid.,* Art.13 (2). *"(2) Where the woman is a* janda *– (a) subject to paragraph (c), she shall not, at any time prior to the expiry of the '*iddah *period, be married to any man other than to the man from whom she was last divorced; (b) she shall not be married unless she has given her clear consent and after she has produced – (i) a copy of a valid certificate of divorce issued under any law then in force; (ii) a certified copy of the entry relating to her divorce in the relevant register of divorce; or (iii) a certificate which may upon her application, be granted after due inquiry by a* Syar'ie *Judge having jurisdiction in the place where the application is made, to the effect that she is a* janda*; (c) if the divorce was* baainkubra*, that is three* talaq*, she shall not remarry her previous husband, unless she has been lawfully married to some other person and that marriage has been consummated and later lawfully dissolved and the '*iddah *period has expired."*

[666] *Ibid.,* Art.13 (3). *"(3) Where the woman alleges that she was divorced before the marriage has been consummated, she shall not, during the '*iddah *period for an ordinary divorce, marry any person other than her previous husband except with the permission of a* Syar'ie *Judge having jurisdiction in the place where she is* bermastautin*."*

[667] *Ibid*., Art.13 (4). *"(4) Where the woman is a widow – (a) she shall not marry any man at any time prior to the expiration of the '*iddah *period; and (b) she shall not marry unless she has produced a certificate of the death of her late husband or has otherwise proved his death."*

[668] *Ibid*., Art.13 (5). *"(5) Where a woman has been pronounced divorced or* fasakh *by the Court and the matter has been referred to the Court of Appeal, she shall not marry any other man while waiting for the decision of the Court of Appeal."*

1.1.2.3 Minimum age

The Brunei Islamic Family Law does not stipulate any minimum age to marry. Under the Marriage Act which applies to Brunei non-Moslem citizens, both parties must be at least 14 years old, while according to the Chinese Marriage, the bride must be at least 15 years old and it is silent on the age of groom.[669]

1.1.2.4 Parents' approval

Consent to a marriage is required not only from the respective couple, but also from the *wali* (means a man who holds a parent's authority over a woman) in accordance with the *Syara'* Law (means the law of any sects which the Court considers valid), or a *Syar'ie* Judge having jurisdiction over the place where the woman is *bermastautin* or any person generally or specifically authorized in that case by a *Syar'ie* Judge who has, due to inquiry in the presence of all parties concerned, granted his consent thereto as *wali Hakim* (means a *Jurunikah* who has been authorized by general appointment by the Sultan (King) to give away a woman in a marriage) in accordance with the *Syara'* Law. Such consent may be given if the *wali* cannot be found or if the *wali* refuses to give his consent without reasonable grounds.[670]

1.1.2.5 Prohibition

The Brunei Islamic Family Law stipulates that no man or woman, for the reason of *nasab* (descendant based on a lawful blood relationship) as case may be, shall marry his mother or her father, his grandmother or any of her ascendants whether on the side of his father or mother; his daughter or her son and his granddaughter or her grandson and their descendants; his sister or her brother of the same parents, his sister or her brother

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[669] Brunei Darussalam, Marriage Act, Cap.76, Art.3. *"3. (Capacity to marry) (1) No two persons shall be capable of contracting a valid marriage unless the following conditions are fulfilled – (a) both parties to the intended marriage have reached the age of 14 years; …"*

Brunei Darussalam, Brunei Chinese Marriage Act, Cap.126., Art.6 (1) *"(1) No Chinese marriage shall be registered, nor shall it be valid, until the female is 15 years of age by English computation. (2) Any person who has carnal connection with a female under 15 years of age by English computation shall be deemed to be guilty of an offence under section 2 of the Unlawful Carnal Knowledge Act, notwithstanding that a marriage ceremony by Chinese law or custom has been performed."* In relation to this requirement, Brunei as the contracting party to the UN Convention on the Rights of the Child,is urged to honor its commitment to increase in the legal age to marry, at least 18 years old.See report *"Brunei urged to raise minimum age of marriage"* of *The Brunei Times* available at http://www.bt.com.bn/news-national/2015/03/14/brunei-urged-raise-minimum-age-marriage#sthash.qWyn6sul.dpbs , accessed on July 29, 2016.

[670] Brunei Darussalam, Brunei Islamic Family Law, Art.12. *"(12) A marriage shall be void and shall not be registered under this Act unless both parties to the marriage have consented thereto, and either – (a) the* wali *of the woman has consented thereto in accordance with* Hukum Syara'*; or (b) a* Syari'ie *Judge having jurisdiction in the place where the woman is* bermastautin *or any person generally or specially authorised in that behalf by the Syar'ie Judge has, after due inquiry in the presence of all parties concerned, granted his consent thereto as* wali *Hakim in accordance with* Hukum Syara'*. Such consent may be given if the* wali *cannot be found or if the* wali *refuses to give his consent without reasonable grounds."*

of the same father, and his sister or her brother of the same mother; the daughter of his brother or sister, or the son of her brother or sister and the descendants of the brother or sister; his aunt or her uncle on the father's side and their descendants; his aunt or her uncle on the mother's side and their ascendants.[671]

No man or woman, on the grounds of affinity, shall marry his mother-in-law or her father-in-law and their ascendants; his stepmother or her stepfather, namely his father's wife or her mother's husband, his step-grandmother namely the wife of his grandfather or her step-grandfather namely the husband of her grandmother, whether on the side of the father or the mother; his daughter-in-law or her son-in-law; his step-daughter or her step-son and their descendants from the wives he has consummated.[672]

A marriage between a man or woman is prohibited if he or she marries any woman or man connected to him or her through family of *sesusuan*[673]where, if the relationship is through birth and not through *sesusuan,* the woman or man will still have been prohibited from marrying each other on the grounds of *nasab* or affinity.[674]

No man shall have two wives at a time if the wives are related to each other by *nasab,* affinity or *sesusuan* and where the relationship is of a type that if either of them had been a man rendering the marriage between them still void in accordance with the Syara' Law.[675]

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[671] *Ibid.,* Art.9 (1). *"(1) No man or woman, as the case may be, shall, on the grounds of* nasab*, marry – (a) his mother or her father; (b) his grandmother or any of her ascendants whether on the side of his father or mother; (c) his daughter or her son and his granddaughter or her grandson and their descendants; (d) his sister or her brother of the same parents, his sister or her brother of the same father, and his sister or her brother of the same mother; (e) the daughter of his brother or sister, or the son of her brother or sister and the descendants of the brother or sister; (f) his aunt or her uncle on the father's side and their ascendants; (g) his aunt or her uncle on the mother's side and their ascendants."*

[672] *Ibid.,* Art.9 (2). *"(2) No man or woman, as the case may be, shall, on the grounds of affinity, marry – (a) his mother-in-law or her father-in-law and their ascendants; (b) his stepmother or her stepfather, being his father's or her mother's husband; (c) his step-grandmother being the wife of his grandfather or her step-grandfather being the husband of her grandmother, whether on the side of the father or the mother; (d) his daughter-in-law or her son-in-law; (e) his stepdaughter or her stepson and their descendants from the wives he has consummated."*

[673] Brunei Darussalam, Interpretation of the Brunei Islamic Family Law, Art.2. *"*Sesusuan *means a child, below 2 years old according to the Islamic calendar (*qamariyah*), who is satisfied by breast feeding on at least 5 occasions by a woman who is not his or her biological mother."*

[674] Brunei Darussalam, Brunei Islamic Family Law*, Loc. Cit.*,Art.9 (3). *"(3) No man or woman, as the case may be, shall marry any woman or any man connected with him or her through* sesusuan *where, if the relationship is through birth and not* sesusuan*, the woman or man would still have been prohibited from marrying on the grounds of* nasab *or affinity."*

[675] *Ibid.,* Art.9 (4). *"(4) No man shall have two wives at any one time if the wives are related to each other by* nasab*, affinity or* sesusuan *and where the relationship is of a type that if either of them had been a man rendering the marriage between them still void in accordance with* Hukum Syara'*."*

1.1.2.6 Heterosexual Couple

There is no express provision which states that parties to a marriage must be a heterosexual couple. However, based on the basic principle of the Islamic Family Law and also descriptions scattered in the Brunei Islamic Family Law, a couple to a marriage is a man and woman. Therefore, it can be concluded that a couple to a marriage must be a heterosexual couple, or in other words, a same-sex marriage is prohibited.

1.1.3 Solemnization of Marriage

A marriage must be solemnized by a *Jurunikah*. The application must be made by a couple within 14 days before a marriage is solemnized, except when it is necessary for a marriage to be solemnized urgently due to unavoidable and reasonable reasons according to the opinion of the registrar.[676] The registrar will check the truth of the matters stated in the application, fulfillment of the requirements for a marriage, and approval from the judge to hold a polygamous marriage for a man.[677]

Solemnization of marriage must be conducted in an area in which a woman or man who intends to marry has his/her residence (*bermastautin*).[678]

The *mas kahwin, belanja* or *pemberian,* or all or any two of them at the same time, may be paid by a man or his representative to a woman or her representative by way of cash or loan with or without security and shall be in a way agreed upon by the parties. Upon the payment, a *Jurunikah* shall record the marriage in the presence of *wali* and two witnesses who are present at the time the marriage is solemnized. After the registration of marriage and upon payment of the fees, the registrar shall issue a marriage certificate and a marriage card to both parties to the marriage.[679]

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[676] *Ibid*., Art.14. Please see footnote No.3.

[677] *Ibid.,* Art.16. *"Subject to section 17, the Registrar, on being satisfied of the truth of the matters stated in the application, of the validity of the intended marriage, and where the man is already married, that the permission required under section 23(3) has been granted, shall, on the payment of the prescribed fee, issue to the applicant his permission in the prescribed form to marry."*

[678] *Ibid.,* Art.19. *"(1) No marriage shall be solemnised except in the area in which either the woman or man who intends to marry is* bermastautin*. (2) Notwithstanding subsection (1), a marriage may be solemnised in Brunei Darussalam, the Registrar or Syar'ie Judge giving permission to marry under section 16 or 17 gives permission for the marriage to be solemnised in an area agreed by both parties; (b) in a case where the woman or man is* bermastautin *in a country outside Brunei Darussalam, a permission to marry and a permission for the marriage to be solemnised elsewhere have been given by the proper authority of that country. (3) A permission under subsection (2) may be included in the permission to marry given under section 16 or 17."*

[679] *Ibid*., Art.20, 21, 22.

Art.20 of the Brunei Islamic Law, *"The* mas kahwin, belanja *or* pemberian*, or all or any two of them at the same time, may be paid by the man or his representative to the woman or her representative by way of cash or loan whether with or without security and shall be made in a way agreed upon by the parties."*

Art.21 of the Brunei Islamic Law, *"(1) immediately after the solemnisation of a marriage, the Registrar shall enter the prescribed particulars and the prescribed* ta'liq *or other* ta'liq *of the marriage in the Marriage Register as appearing in the prescribed Marriage Entry form. (2) The entry shall be attested by the parties to the*

1.1.4 Comparison with MA 1974

The Brunei Islamic Family Law has no definition of marriage, while MA 1974 mentions it in its first article, namely a relation between a man and woman to establish a family that relies on the value of religion.

In relation to other requirements, namely consent from the bride and groom, limited polygamous marriage, heterosexual couple, the Brunei Islamic Family Law and MA 1974 require similar conditions.

The difference is about the minimum age to marry. Brunei does not specify the minimum age for a groom and bride, while the Chinese Marriage Law requires the minimum age of 15 years old for a bride while is silent on the minimum age of a groom. Indonesia requires the minimum age of 18 years old for a groom and 16 years old for a bride.

In relation to marriage prohibitions, MA 1974 requires less prohibition than the Brunei Islamic Family Law. However, prohibitions for a Moslem couple become relatively similar, since MA 1974 requires that prohibitions of the couple's religion are also applied.

The regulations on marriage stipulated in the Brunei Islamic Family Law, which are based on the concept of Islamic Law, are similar to the Moslem marriage law in Indonesia stipulated in the Compilation of Islamic Laws. It has requirement of consent from the bride and groom, limited polygamous marriage, marriage prohibitions including heterosexual couple. The similarity gives exception only to the minimum age to marry.

In relation to solemnization, the Brunei Islamic Family Law and MA 1974 require that a marriage must be registered with the relevant Registrar Office after the solemnization. The Brunei Islamic Family Law requires the registration for validation, while according to MA 1974, registration is not the only requirement for validation.

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marriage, by the wali *and by two witnesses as well as the* jurunikah *who were present at the time the marriage was solemnised. (3) For every marriage to be registered by him, the* jurunikah *shall ascertain and record- (a) the value and particulars of the* maskahwin*; (b) the value and particulars of the* belanja*; (c) the value and particulars of the* pemberian*; (d) the value and particulars of any other* maskahwin*,* belanja *or* pemberian *which have been promised but not paid at the time the marriage was solemnised; (e) particulars of any security given towards payment of any* maskahwin*,* belanja *or* pemberian*. (4) The entry shall then be signed by the* jurunikah*."*

Art.22 of the Brunei Islamic law, *"(1) After the registration of a marriage and upon payment of the prescribed fees, the Registrar shall issue a Marriage Certificate and a Marriage Card in the prescribed form to both parties to the marriage. (2) The Registrar shall also, on payment of the prescribed fee, issue a* Ta'liq *Certificate in the prescribed form to both parties to the marriage. (3) The original Marriage Certificate, Marriage Card and* Ta'liq *Certificate shall be kept by the Registrar of a district."*

1.2 Cambodia

The Cambodian Marriage Law is incorporated in the Cambodian Civil Code 2007, in Chapter 3 of Book Seven with the title "Relatives", herein referred to as the "**Cambodian Civil Code**". Relatives refer to persons who are relatives by consanguinity up to the sixth degree of relationship, spouse and relatives by affinity up to the third degree of relationship.[680] This book 7 of the Cambodian Civil Code deals with various relations, among others, betrothal of engagement, marriage, relation between parents and children, parent's authority, guardianship, receiver and support.[681]

1.2.1 Definition of Marriage

The Cambodian Civil Code does not give any definition with regard to marriage. Marriage definition can be found in the Law on Marriage and Family dated July 26, 1989, but this law no longer prevails. It is stated that a marriage is a solemn contract between a man and woman in the spirit of love in accordance with the provisions of law and with the understanding that they cannot dissolve it as they please. A marriage will have a legal effect only if such marriage is accordance with the provisions of law.[682]

The definition of marriage is also found in the Law on Monogamy which was promulgated on October 26, 2006, hereinafter referred to as the "Law on Monogamy". It gives the same definition as the above, namely marriage is a solemn contract in which one man and one woman establish a union that is sanctioned by law and may not be broken only at their wishes. Such marriage shall be monogamy which is a marriage in which one man has only one wife and one woman has only one husband.[683] The previous definition states that a marriage is a relation between one man and one woman, exclusively, to be together. In this definition, relation is the main point of marriage rather than a descendant. In addition, the definition reflects the monogamous principle.

The Cambodian Civil Law does not stipulate the definition, but it stipulates that a marriage can only be legally recognized if it is legally registered according to the law. This can be read from Article 955 of the Cambodian Civil Code, but it does not regulate

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[680] Cambodia, Cambodian Civil Code, Art.938. *"Relatives refer to the persons listed below: (a) relatives by consanguinity up to the sixth degree of relationship; (b) Spouses; and (c) Relatives by affinity up to the third degree of relationship."*

[681] Book 7 of the Cambodian Civil Code, Art.938- 1144. See also Hor Peng, Kong Phallack, Jörg Menzel (eds.), *Introduction to Cambodian Law,* (Cambodia: Konrad-Adenauer-Stiftung, 2012), p.126.

[682] Cambodia, the Cambodian Marriage Law 1989, Art.3. *"A marriage is a solemn contract between a man and a woman in a spirit of love in accordance with the provisions of law and with the understanding that they cannot dissolve it as they please. A marriage shall have legal effect only if such marriage is conducted in accordance with the provisions provided in this law."*

[683] Cambodia, Law on Monogamy, Art.3. *"3. Monogamy is a marriage in which one man has one wife and one wife has only one husband. Marriage is a solemn contract by which one man and one woman establish a union that sanctioned by law and may not be broken at their wish."*

the consequences of a couple who fail to legally register their marriage with the civil registry.[684]

1.2.2 Capacity to Marry

1.2.2.1 Consent of the parties to a marriage

A marriage between a man and woman is considered to be void if there is no common intention between them to be together, or on account of any mistake of identity, coercion or any other causes.[685] This is also mentioned in the Cambodian Constitution that a husband and wife enter into a marriage based on the principle of mutual consent.[686]

A person who has been induced by fraud or suppression to enter into a marriage may request the annulment of such marriage. This right is valid for 3 months since the party discovers that fraud or becomes free from the suppression he or she endures. The right of annulment shall terminate if the period of 3 months lapses, or if the party ratifies the marriage.[687]

1.2.2.2 Monogamy

A marriage in Cambodia is required to be a monogamous marriage. A person who is already bound to a marriage is prohibited from having a second marriage.[688] A man must have one wife at a time and vice versa. A polygamous marriage and polyandry marriage are forbidden. This principle is in line with the definition of marriage in its previous act.

A woman is able to enter into her second marriage, but she must wait 120 days of her marriage dissolution or annulment of her previous marriage. This provision is equal to the *iddah* period. However, such provision does not apply if the woman is pregnant prior to marriage dissolution or annulment of the previous marriage and has given birth, or if

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[684] Dorine Van Der Keur, *Legal and Gender Issues of Marriage and Divorce in Cambodia, Cambodia Law and Policy Journal issued July 2, 2014,* pp.2 and 4, available at*http://cambodialpj.org/wp-content/uploads/2014/07/DCCAM_CLPJ-Issue-2_FINAL.pdf,* accessed on October 31, 2016.See also Hor Peng, Kong Phallack, Jörg Menzel (eds.), *Ibid.*

[685]*Ibid.,* Art.958. *"958. (Nullity of marriage) A marriage shall be treated as void only in the following cases: (a) Where there is no intention to marry common to the parties on the account of mistake as to the identity of the other party, coercion or other cause; (b) Where the parties do not effect notification, public notice, conclusion of the contract of marriage or registration thereof; provided that a slight procedural defect alone shall not preclude validity of the marriage."*

[686] Cambodia, Cambodian Constitution, Art.45 paragraph (4). "*Marriage shall be conducted according to law, based on the principle of mutual consent between one husband and one wife.*"

[687] Cambodia, Cambodian Civil Code, *Loc. Cit.*, Art.963. *"963. (Annulment of marriage based on fraud or duress) (1) A person who has been induced by fraud or duress to effect a marriage may apply to the court for annulment of such marriage. (2) The right of annulment described in paragraph (1) shall be extinguished if 3 months have elapsed since the party discovered the fraud or became free of the duress, or if the party has ratified the marriage."*

[688]*Ibid.,* Art.949. *"949. (Prohibition of bigamy) A person who has a spouse may not effect an additional marriage."*

she has a doctor certificate stating that she is not pregnant.[689] The spouse or former spouse or the prosecutor may request a petition on the reason of bigamy or any marriage which takes place before the elapse of 120 days.[690] These provisions are aimed at protecting the paternal rights of the first husband.

The Law on Monogamy stipulates that Cambodian citizens must sincerely respect the principle of monogamy, one husband and one wife. This law is aimed at strengthening harmony and happiness in families and at ensuring the rights and respect between a husband and wife.[691] Bigamy, which is defined as the act of a married person to enter into another marriage while his or her previous marriage has not been legally dissolved, is forbidden.[692] Bigamy can be subject to imprisonment for 6 months until 1 year or fine in the amount of 200,000 to 2,000,000 riels or both.[693]

1.2.2.3 Minimum age

A marriage is allowed when a bride is 18 years old, but if one of the parties has reached the age of maturity and the other party is a minor of at least 16 years old, the parties may marry with consent of the parents or their legal guardians.[694]

Either party to a marriage, their parents or a public prosecutor may petition to a court for the annulment of marriage, if the couple have not reached the minimum age of marriage. The public prosecutor may not make a petition for annulment after the death of one of the parties.[695]

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[689] *Ibid.,* Art.950. *"950. (Period of prohibition of remarriage) (1) A woman may not remarry until 120 days have elapsed from the day of the dissolution or annulment of her previous marriage. (2) The provisions of paragraph (1) shall not apply if the woman was already pregnant from before the dissolution or annulment of the previous marriage and has given birth, or if she has a doctor's certificate that she is not pregnant."*

[690] *Ibid.,* Art.961. *"961. (Extinguishment of right to annul marriage under marriageable age) (1) No application may be made to annul a marriage effected in contravention of Article 948 (Marriageable Age) once the under-age party attains the marriageable age."*

[691] Cambodia, Law on Monogamy, *Loc. Cit.,* Art. 1, 2. *"1. The purpose of this law is to protect dignity, to strengthen harmony and happiness in families, and to ensure rights and respect between a husband and a wife in accordance with article 45 of the Constitution of Kingdom of Cambodia and in addition to the laws already in force. 2. A Khmer citizen of either sec who is marries must sincerely respect the principle of monogamy, of one husband and one wife, by registering their marriage in front of Commune Council Members pursuant to the Law on Marriage and Family."*

[692] *Ibid.,*Art.4. *"4. Bigamy is the act of a person who is already married contracting another marriage. A person commits the offence of bigamy if they register his/her new marriage to another person while his or her prior marriage has not been dissolved."*

[693] *Ibid.,* Art.9. *"9. Anyone convicted of the offences in article 4 of this law will be sentenced to a term of imprisonment of between 6 months and 1 year or a fine of between 200,000 riels to 1,000,000 riels or both."*

[694] Cambodia, Cambodian Civil Code, *Loc. Cit.,* Art.948. *"948. (Marriageable age) Neither men nor women may marry until they have reached the age of 18. However, if one of the parties has attained the age of majority and the other party is a minor at least 16 years of age, the parties may marry with the consent of the parental power holders or guardian of the minor."*

[695] *Ibid.,* Art.960 (1). *"960. (Annulment of unlawful marriage) (1) Either party to a marriage, their parents or a public prosecutor may apply to the court for annulment of a marriage effected in of Article 948 (Marriageable*

No petition may be made to annul a marriage once the under-age-party reaches the minimum age to marry. An under-age-party to a marriage may petition for the annulment of marriage during the period of 3 months after he or she reaches the minimum age to marry, except he or she has ratified the marriage after reaching the minimum age to marry.[696]A minor who is legally married shall be deemed to be an adult.[697]

1.2.2.4 Parents' approval

Approval from parents of the bride and groom is required if they are minor or under 18 years old. Any consent of parents of minor or guardian must be obtained. If one of the parental power holders does not give any approval, approval of the other parental power holder is sufficient. If the parent(s) or guardian unreasonably refuses to give any approval, the respective minor may petition to a court for marriage approval.[698]

A person under general guardianship may marry without marriage approval if he or she has reached 18 years old.[699]

1.2.2.5 Prohibition

No marriage is valid between lineal relatives by consanguinity, nor between collateral relatives up to and including the third degree of relationship. The same provision also applies to a marriage between lineal relatives by affinity, provided that the husband or

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age) to 952 (Prohibition of marriage between relatives by affinity); provided that a public prosecutor may not make such an application after the death of one of the parties. (2) The spouse or former spouse of the party may also apply for annulment of a marriage effected in contravention of Articles 949 (Prohibition of bigamy) or 950 (Period of prohibition of remarriage)."

[696]*Ibid.,* Art.961. *"961. (Extinguishment of the right to annul marriage under marriageable age) (1) No application may be made to annul a marriage effected in contravention of Article 948 (Marriageable age) once the under-age party attains the marriageable age. (2) An under-age party to a marriage may apply for annulment of the marriage during the period of 3 months following his or her attainment of the marriageable age, except where he or she has ratified the marriage after attaining the marriageable age."*

[697]*Ibid.*, Art.968. *"968. (Fictional attainment of majority upon marriage) In the application of this Code, a minor who marries shall be deemed to have attained his or her majority by so doing."*

[698] *Ibid.,* Art.948 jo. Art.953. *"948. (Marriageable age) Neither men nor women may marry until they have reached the age of 18. However, if one of the parties has attained the age of majority and the other party is a minor at least 16 years of age, the parties may marry with the consent of the parental power holders or guardian of the minor."*

"953. (Marriage of minor) (1) If one of the parties wishing to marry is a minor, the consent of parental power holders or guardian must be obtained. (2) If one of the parental power holders does not consent, the consent of the other parental power holder shall be sufficient. (3) If the parental power holders or guardian unreasonably refuse to give consent, the minor wishing to marry may apply to the court for adjudication in place of consent."

[699]*Ibid.,* Art.954. *"954. (Marriage of person under general guardianship) A person under general guardianship may marry if he or she has the minimum capacity required to effect a marriage. In such a case the consent of the general guardian is not required."*

wife has passed away, and the surviving spouse may marry a person who is a collateral relative by affinity up to and including to the third-degree of relationship.[700]

1.2.2.6 Heterosexual Couple

The formation of engagement in the Cambodian Civil Code clearly mentions that such relation is between a man and a woman, instead of a husband and a wife.[701] Based on these provisions, it is understood that engagement is provided and open for a heterosexual couple, instead of a same-sex couple.

In the Cambodian Constitution, it is stated that a marriage shall be conducted according to the law, based on the principle of mutual consent between one husband and one wife.[702] Provisions of the Cambodian Civil Code, save for the provision on engagement, refer a party or parties in a marriage to "husband", "wife" or "couple", instead of man or woman as a reference to sexual identity of the couple. The above provisions can traditionally be understood as between a man and woman.

On the other hand, the provisions above can be interpreted as it is open for a same-sex marriage. The phrase "one husband" or "one wife" replaces the word "man" or "woman" for the purpose of enabling a same-sex marriage in the future according to a government spokesman. There is a report saying that a same-sex marriage couple is legally registered in a province in Cambodia.[703] However, until now, there is no regulation at the national level to support such interpretation and/or implementation yet. Therefore, it cannot be mentioned or too soon to conclude that, the Cambodian regulations prohibit a same-sex marriage, or allow a same-sex marriage.

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[700] *Ibid.*, Art.951-952. *"951. (Prohibition of marriage between relatives by consanguinity) (1) No marriage may be effected between lineal relatives by consanguinity, nor between collateral relatives by consanguinity up to and including the third degree of relationship. (2) Paragraph (1) shall apply notwithstanding the termination of relationship pursuant to the provisions of Article 1013 (Dissolution of full adoption) or 1029 (Effect of dissolution of simple adoption).*

952. (Prohibition of marriage between relatives by affinity) (1) No marriage may be effected between lineal relatives by affinity. The same shall apply notwithstanding the termination of affinity pursuant to the provisions of Article 941 (Extinguishment of affinity), 1013 (Dissolution of full adoption) or 1029 (Effect of dissolution of simple adoption). (2) No marriage may be effected between collateral relatives by affinity up to and including the third degree of relationship. The same shall apply notwithstanding the termination of affinity pursuant to the provisions of Article 941 (Extinguishment of affinity); provided that where either husband or wife has died, the surviving spouse may marry a person who was a collateral relative by affinity up to and including the third degree of relationship."

[701] *Ibid.*, Art.944. *"944. (Formation of engagement) An engagement shall be formed by promising to marry in the future between a man and a woman and performing the ceremony of engagement."*

[702] Cambodia, Cambodian Constitution, *Loc. Cit.*, Art.45 paragraph (4). "*Marriage shall be conducted according to law, based on the principle of mutual consent between one husband and one wife.*"

[703] See *Report: Family values at forefront of LGBT youth discrimination in Cambodia*, Asian Correspondent, available at https://asiancorrespondent.com/2015/12/report-family-values-at-forefront-of-lgbt-youth-discrimination-in-cambodia/ accessed on October 31,2016.

The annulment of marriage shall have no retroactive effect. If a party who is unaware at the time of marriage of the existence of grounds for its annulment has acquired property as a result of the marriage, he or she must return such property to the extent that he or she currently benefits. A party who is aware at the time of marriage of the existence of grounds for its annulment must return the whole benefit that such party has obtained as a result of marriage, and furthermore must be liable to compensate the other party for any damages if the other party acts bona fide.

A child born 180 days or more after a day on which a marriage takes place or born not later than 300 days after a day on which a marriage is dissolved or annulled shall be presumed to be the child of the husband.[704]

In relation to property, it shall be divided fairly in accordance with the agreement between the parties to the marriage.[705]

1.2.3 Solemnization of Marriage

A marriage is valid by virtue of notification, public notice and conclusion of marriage before a family registration office and marriage registration, according to the procedure described in the prevailing regulations. Notification of marriage may be accepted after a registration office has confirmed that there is no infringement of the minimum age requirement as well as consent of parents, as relevant.[706]

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[704] Cambodia, Cambodian Civil Law, *Loc. Cit.*, Art.964 (4) jo. Art.988 (2). *"963. (Effect of annulment of marriage) … (4) The provisions of Article 988 (Presumption of paternity) shall apply mutatis mutandis to any child born to the parties to a marriage that is to be annulled."*

"988. (Presumption of paternity) (1) A child conceived by the wife during the marriage shall be presumed to be the child of the husband. (2) A child born 180 days or more after the day on which the marriage was formed or born not later than 300 days after the day on which the marriage was dissolved or annulled shall be presumed to have been conceived during the marriage. (3) If a woman who has remarried contrary to the provisions of Article 950 (Period of prohibition of remarriage) gives birth to a child and the father of the child cannot be determined in accordance with the provisions of paragraphs (1) and (2), the child shall be presumed to a child of the later marriage."

[705] *Ibid.*, Art.980. *"980. (Division of property) (1) In case of divorce, the property, shall be divided fairly in accordance with the agreement of the parties to the marriage. (2) If the spouses are unable to agree upon consultation, the property shall be divided in accordance with the following provisions: (a) each spouse shall retain separate property stated in Article 972 (Separate property). (b) Each spouse shall have the right to receive one half of the common in addition to his or her separate property; provided that where there are special circumstances and also an application is filed by one of the parties, the court may divide the common property (otherwise) taking into account all the circumstances, including, without limitation, the contribution of each spouse to the acquisition, maintenance and increase of property, the period of the marriage, the living standard during the marriage, the age, mental and physical condition of each spouse, their occupations, income and earning capacity, the welfare of any children, etc. (3) Housework shall be deemed to have the same value as work outside the house."*

[706] *Ibid.*, Art.955, 956. *"955. (Notification and registration of marriage) (1) A marriage shall come into effect by virtue of notification, public notice, conclusion of the marriage contract in the presence of the family registration official and marriage registration. (2) The notification, public notice, conclusion of marriage contract*

Registration of marriage at a registrar office according to the law is the validation of marriage.[707] In the other words, unregistered marriage is a void marriage.

1.2.4 Comparison with MA 1974

The Cambodian Constitution states that a marriage shall be conducted in accordance with the law, based on the mutual consent between a husband and wife, while the Cambodian Civil Code has no definition of marriage. MA 1974 gives a relatively different definition, namely a marriage is a relation between a man and woman to establish a family based on the Almighty God.

The first difference in the definition is about relation between a couple. The Cambodian Constitution refers to the words "husband" and "wife", which can be interpreted as the function or position of each person in a marriage rather sexual identity. MA 1974 clearly states that a couple must be between a man and woman. Reference is expressly addressed to the sexual identity of the couple. In addition, Indonesia relies a marriage on the value of religion as reflected in the phrase *"... based on the Almighty God."*, while the Cambodian Constitution is silent about the value of religion.

In relation to other requirements, consent from the respective groom and bride including the right to annulment petition, minimum age, parents' approval are quite similar with those stipulated in MA 1974.

The Cambodian Civil Code requires absolute monogamy, while MA 1974 allows a polygamous marriage with certain requirements or limited polygamous marriage. The monogamy requirement requires that a woman is not only legally divorced from her previous husband but also fulfills the lapse of waiting period that protects the paternal rights of the former husband. An exception can be made if a woman has a statement letter stating that she is not pregnant from an authorized party, while MA 1974 has no such provision.

Prohibitions in the Cambodian Civil Code and MA 1974 are similar as they prohibit a couple who have blood relationship and also affinity relationship from marrying.

In relation to solemnization, the Cambodian Civil Code and MA 1974 have the same requirement, namely that a marriage must be registered with the relevant Civil Registrar. The Cambodian Civil Code requires the registration for marriage validation, while MA

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and registration described in paragraph (1) shall be effected in accordance with the procedures prescribed by the Status Registration Order."

"956. (Acceptance of notification of marriage) A notification of marriage may be accepted only after confirming that there is no infringement of Article 948 (Marriageable age) to 954 (Marriage of person under general guardianship) inclusive."

[707] Dorine Van Der Keur, Dorine Van Der Keur, *Legal and Gender Issues of Marriage and Divorce in Cambodia, Cambodia Law and Policy Journal issued 2 July 2014, Op.Cit., pp.*2 and 4.

1974 stipulates that registration is a must but it is not the only point of marriage validation.

1.3 Lao People's Democratic Republic

The Marriage Law in Lao PDR is stipulated in law No.07/09/SPA, signed by the President of Lao People's Democratic Republic on November 29,1990, herein referred to as the "**Lao Marriage Law**".

1.3.1 Definition of Marriage

The Lao Marriage Law does not provide any definition of marriage; however, it provides the purpose of family law. It aims to preserve and strengthen a family into a strong component of Lao's society. This law is to establish matrimonial and family relationship based on mutual consent and equality between a men and women, to educate children to live the family, and nation, and to participate in the protection and development of the nation. It also aims to protect the interest of mothers and children in family life and upon divorce. Lastly but not least, it aims to preserve and develop fine customs and traditions.[708]

In a family relationship and in pursuing the objective of family, a man and woman both have equal rights in all aspects.[709]

1.3.2 Capacity to Marry

1.3.2.1 Consent of the parties to a marriage

To enter into a marriage, a man and woman have to give their mutual consent on the basis of freedom and love. It is prohibited from forcing or hindering another individual's

[708] Lao PDR, Marriage Law, Law No.07/09/SPA dated November 29, 1990, Art.1, 5. *"1. (Purpose of the family law) The Family Law aims to: preserve and strengthen the family into a firm cell of Lao society; establish matrimonial and family relationships based on mutual consent and equality between men and women; educate children to love the family, (and) nation, and to participate in the protection and development of the nation; protect the interest of mothers and children in family life and upon divorce; and preserve and develop fine custom and traditions."*

"5. The state and society protect the interest of mothers and children in family life [when a married couple live together] and when a married couple no longer cohabitate."

[709] *Ibid.*, Art.2. *"2. (Equality between men and women in family relationship). Men and women have equal rights in all aspects pertaining family relationships. Family relationships arise independently from the origins, socio-economic status, nationality, ethnicity, educational level, occupation, beliefs, place of residence and others."*

marriage. A couple enters into a marriage which must be based on mutual consent from both sides without coercion from any third parties.[710]

The annulment of marriage can be petitioned if there is no consent of the parties to a marriage. A matrimonial relationship between a man and woman shall cease, but children born during the marriage shall be considered legitimate.[711]

1.3.2.2 Monogamy

Marriage in Lao PDR is governed by the system of monogamy, absolute monogamy.[712]A polygamous marriage and polyandry marriage are forbidden. Re-marriage is allowed, but, a man must only have one wife and vice versa at a time. However, the author does not find any provisions on the waiting period after divorce or *iddah* or any other provisions to confirm that a woman is not pregnant from her previous husband.

1.3.2.3 Minimum age

The minimum age for a bride and groom is the same, namely 18 years old. In special and necessary cases, this limitation may be lowered to less than 18 years old, but not less than 15 years old.[713]

1.3.2.4 Parents' approval

A man should ask his parents and elder relatives to ask for a woman from her parents and elder relatives according to customs and traditions, and they should decide upon the wedding together.[714] Therefore, approval from parents is a must.

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[710]*Ibid.*, Art.3 jo. Art.9. *"3. (Freedom to marry) Men and women who have attained the age of marriage have the right to marry on the basis of mutual consent, freedom and love. It is forbidden to force or hinder another individual's marriage."*

"9. (Condition for marriage) Men and women have the right to marry at 18 years of age. In special and necessary cases, this limit may be lowered to less than 18 years of age but not less than 15 years of age. Marriage must be based on mutual consent from both sided without coercion from any side or individual."

[711]*Ibid.*, Art.17, 19. *"17. (Null marriage) A "null marriage" refers to a marriage transgressing any of the conditions in Article 9 and 10 of this law. … 19. (Consequence of null marriage) If a null marriage is dissolved, the matrimonial relationship shall cease but children conceived or born during the marriage shall be considered legitimate. Asset acquired during the marriage before its dissolution are subject to regulations outlined in this law and the Property Law."*

[712]*Ibid.*, Art.4. *"4. (Monogamy) Marriage is governed by the system of monogamy."*

[713]*Ibid.*, Art.9. *"9. (Condition for marriage) Men and women have the right to marry at 18 years of age. In special and necessary cases, this limit may be lowered to less than 18 years of age but not less than 15 years of age. Marriage must be based on mutual consent from both sided without coercion from any side or individual."*

[714]*Ibid.*, Art.6. *"6. (Proposals) When a young couple enter a relationship of love and decide to marry, the man should ask his parents and elder relatives to ask for the women's hand from her parents and elder relatives according to customs and traditions, and they should decide upon the wedding together."*

1.3.2.5 Prohibition

A marriage is prohibited if one of the couples is in a state of deficient mental or physical health which may become a threat to family life or health of the spouses or children. A marriage between a couple who come from the same bloodline such as, parents, paternal and maternal grandparents upwards, children and grandchildren downwards, between adoptive parents and adopted children, between step-parents and step-children, between adoptive children and biological children, between siblings and between uncles or aunts and nieces or nephews.[715]

The annulment of marriage occurs if a marriage does not fulfill the requirement of minimum age and prohibitions as stated above.[716] The annulment of marriage must be conducted within the relevant jurisdiction of the people's court. The public prosecutor, family registrar officer, parents-in-law, and husband and wife have the right to petition for the annulment of marriage.[717] In the event that a marriage is dissolved by a court, the matrimonial relationship shall cease, but, children who are born during the marriage shall be considered as legitimate children. Matrimonial assets during a marriage are subject to regulations and the property law.[718]

1.3.2.6 Heterosexual Couple

The PDR's Marriage Law is silent in relation to a same-sex marriage. There is no direct stipulation that prohibits a same-sex marriage. However, in the purpose and objective of the family law, it mentions the relation of family law as the equal relationship between a man and woman, and the requirements of marriage mention that a couple is a man and woman.[719] Therefore, it can be concluded that a marriage must be between a couple who is a man and woman.

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[715] *Ibid.*, Art.10. *"10. (Prohibition of marriage) Marriage shall be prohibited in the following cases: (1). Marriage between individuals in a state of deficient mental or physical health which could become a threat to the lives or health of their spouses or children. (2) Marriage between individuals from the same bloodline such as parents, paternal and maternal grandparents upwards, with children and grandchildren downwards, between adoptive parents and adopted children, between step-parents and step-children, between adopted children and natural children, between siblings, and between uncles or aunts with nieces and nephews."*

[716] *Ibid.*, Art.17. *"17. (Null marriage) A null marriage refers to a marriage transgressing any of the conditions in Article 9 and 10 of this law."*

[717] *Ibid.*, Art.18. *"18. (Dissolution of null marriage) The dissolution of a null marriage is within the jurisdiction of the people's court. The public prosecutor, the family registrar office, the parents-in-law, and the husband and wife have the right to request the dissolution of a null marriage."*

[718] *Ibid.*, Art.19. *"19 (Consequences of null marriage) If a null marriage is dissolved, the matrimonial relationship shall cease but children conceived or born during the marriage shall be considered legitimate. Assets during the marriage before its dissolution are subject to regulations outlined in this law and the Property Law."*

[719] *Ibid.*, Art.2, 3 and 9. See footnotes in page 18, 19 and 20.

1.3.3 Solemnization of Marriage

A couple who has the intention to marry must submit a written request to the family registrar office. The family registration office must consider the request for marriage within one month from the day on which such request is received. In the event that the couple meet all the required conditions, the family registration office shall invite the couple to register their marriage in the presence of three witnesses.[720] The marriage and legal relationship shall arise from the day of marriage registration.[721]

A traditional wedding ceremony may or may not be performed simultaneously or after the marriage registration. Such traditional ceremony does not have any legal impact on the registered marriage. The matrimonial relationship between the couple arises from the day of the registration of marriage.[722] The registration requirement also applies to the re-marriage of a divorced husband and wife.[723]

1.3.4 Comparison with MA 1974

Lao PDR's Marriage Law does not give any definition, but it provides the objectives and purposes of the family law. It states that a marriage establishes a matrimonial and family relationship based on mutual consent and equality between a men and women, to educate children to live the family and nation and to participate in the protection and development of the nation. The other objective is about to protect the interest of mother and children in family life and upon divorce. MA 1974 defines a marriage with a purpose to establish a happy household or family, without stating its interest in the nation as well as customs and traditions. The difference between the Lao PDR and Indonesia is the basis of marriage, on which the Lao PDR is silent while Indonesia relies a marriage on the value of religion as reflected in the phrase *"... based on the Almighty God."* However, both the Lao PDR's Marriage Law and MA 1974 preserve the equality between a men and women in a marriage. Both acknowledge that a man and woman have equal rights in a family relationship.

The Lao PDR's Marriage Law requires absolute monogamy, while MA 1974 allows polygamous marriage with certain requirements. The Lao PDR's Marriage Law requires

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[720] *Ibid.*, Art.11. *"11. (Marriage Consideration and Registration) A couple having the intention to marry must submit a written request to the family registrar officer. The family registrar officer must consider the request for marriage within a period not exceeding one month from the day such request is received. If it appears that the couple meet all required conditions, the family registrar officer shall invite the concerned persons to register their act of marriage in the presence of three witnesses."*

[721] *Ibid.*, Art.12 para.(2). *"12. (Wedding ceremony) … The matrimonial relationship shall arise from the day the marriage is registered."*

[722] *Ibid.*, Art.12 para.(1). *"12. (Wedding ceremony) A traditional wedding ceremony may or may not be conducted, simultaneously or after the marriage registration, but (if conducted) must not have any legal impact."*

[723] *Ibid.*, Art.25. *"25. (Re-marriage) A divorce husband and wife wishing to re-marry must register a new marriage."*

the age of 18 years old both for groom and bride. Age of the bride may be lower, but at least 15 years old. MA 1974 requires a groom to have the same minimum age, namely 18 years old, while a bride is 16 years old.

The Lao PDR's Marriage Law and MA 1974 has a similar requirement, namely a couple must obtain the approval of parents or party who holds parental power. However, the Lao PDR's Marriage Law is silent on whether or not parents' approval can be replaced by a court decision, while MA 1974 allows a couple to do so.

In relation to heterosexual requirement and solemnization, the Lao PDR's Marriage Law and MA 1974 require the same. Both prohibit a same-sex marriage. In addition, registration with a Family Registrar Office constitutes the validation of marriage. A traditional wedding ceremony can be performed but it has no legal impact on the marriage. Meanwhile MA 1974 stipulates that registration is a must but it is not the only point of validation.

1.4 Malaysia

A marriage in Malaysia has two types, namely a civil marriage and Islamic marriage. A civil marriage is applied to non-Muslims and non-natives in Malaysia under the Law Reform (Marriage and Divorce) Act No.164 of 1976 as amended to date, herein referred to as the "**Malaysian Law Reform**". The Malaysian Law Reform applies to non-Muslims and persons who have a domicile in Malaysia, while natives in Sabahor Sarawak or natives of Malaysia are subject to the Native Law or customary law except if the persons make a choice to be subject to the Malaysian Law Reform. For Moslems in Malaysia, the Islamic Family Law (Federal Territories) Act 1984 as amended to date applies, hereinafter referred to as the "**Malaysian Islamic Family Law**". The Civil High Courts (secular courts) have jurisdiction over family matters related to non-Muslims, whereas Syariah Courts (so named under the Islamic Law) have jurisdiction over family matters related to Muslims.

This section will describe each requirement of marriage, first a Moslem marriage as stipulated in the Malaysian Islamic Family Law and then, a civil marriage as stipulated in the Malaysian Law Reform.

1.4.1 Definition of Marriage

The Malaysian Law Reform does not define what marriage is. The closest definition of marriage is the term "monogamous marriage" under Chapter II containing Art.5 (1) *jo*.6 (2) and 7 (1) thereof. It is stated that every person lawfully marries under any law, religion, custom or usage to one or more spouses shall be incapable, during the continuance of such marriage, of contracting another valid marriage, by stressing an

exclusive relationship between a couple.[724] If a lawfully married person enters into a union with any woman, such woman shall have no right of succession or inheritance of such male person.[725] A marriage prohibits a couple to enter into another commitment. Such commitment shall not be considered as a marriage, but as a union which then has no right of inheritance as covered in a marriage. Such male person shall be deemed to commit the offense of marrying again.[726]

Based on the important elements of provisions above, a marriage can be considered having an element, namely at least, as a voluntary union between a man and woman to the exclusion of all others for their life-time period.

1.4.2 Capacity to Marry

1.4.2.1 Consent of the parties to a marriage

The Malaysian Islamic Family law stipulates that a marriage shall not be recognized and registered unless both parties to the marriage have consented thereto. In addition, consent of the *wali* of the bride is also required (see the sub-section of parents' approval below).[727]

The Malaysian Law Reform similarly requires that a Registrar of Marriage freely consents to the marriage.[728] The Malaysian Law Reform stipulates that any person who uses force or threat to compel a person to marry against his/her will or to prevent a person who has reached the age of 21 years old from contracting a valid marriage, shall

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[724] Malaysia, Law Reform on Marriage and Divorce, Act No.164 of 1976, Art.5 (1). *"Every person who on the appointed date is lawfully married under any law, religion, custom or usage to one or more spouses shall be incapable, during the continuance of such marriage or marriages, of contracting a valid marriage under any law, religion, custom or usage with any other person, whether the first mentioned marriage of the purported second mentioned marriage is contracted within Malaysia or outside Malaysia."*

[725] *Ibid.,* Art.6 (2). *"If any male person lawfully married under any law, religion, custom or usage shall during the continuance of such marriage contract another union with any woman, such woman shall have no right of succession or inheritance on the death interstate of such male person."*

[726] *Ibid.* Art.7 (1). *"Any person lawfully married under law, religion, custom or usage who during the continuance of such marriage purports to contract a marriage under any law, religion, custom or usage in contravention of section 5 shall be deemed to commit the offence of marrying again during the life-time of husband and wife, as the case may be, within the meaning of section 494 of the Penal Code [Act 574]."*

[727] *Ibid.*, Art.13. "*13. (Consent required) A marriage shall not be recognized and shall not be registered under this Act unless both parties to the marriage have consented thereto, and either – (a) the* wali *of the woman has consented thereto in accordance with Hukum Syarak; or (b) the* Syariah *Judge having jurisdiction in the place where the woman resided or any person generally or specially authorized in that behalf by the* Syariah *Judge has, after due inquiry in presence of all parties concerned, granted his consent thereto as* wali Raja *in accordance with Hukum Syarak; such consent may be given whenever there is no* wali *by* nasab *in accordance with Hukum Syarak available to act or if the* wali *cannot be found or where the* wali *refuses his consent without sufficient reason."*

[728] Malaysia, Malaysian Law Reform, Loc. Cit., Art.22 (6). *"22. (6) No marriage shall be solemnized unless the Registrar is satisfied that both the parties to the marriage freely to consent to the marriage."*

be guilty of an offence and shall, on conviction, be liable to imprisonment for a term not exceeding three years or to a fine not exceeding three thousand ringgit or to both.[729]

1.4.2.2 Monogamy

The Malaysian Islamic Family Law allows a polygamous marriage with prior written permission of a Court.[730] Application for the permission can be submitted to a Court and it shall be accompanied with a statement stating the grounds for which the proposed marriage is alleged to be just and necessary, present income of the applicant, particulars of his commitments and his ascertainable financial obligations and liabilities, number of his dependents, including persons who will be his dependents as a result of the proposed marriage, and whether or not consent or views of the existing wife or wives on the proposed marriage have been obtained.[731] If a man conducts a polygamy marriage without any prior written permission of a court, he commits an offense and shall be punished by a fine or imprisonment or both.[732]

A woman must have one husband at a time, thus a polyandry marriage is forbidden. A woman is allowed to remarry only after the expiry of *iddah* period or upon certain requirements.[733]

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[729] *Ibid.*, Art.37. *"37. (Interference with marriage) Any person who uses any force or threat – (a) to compel a person to marry against his will; or (b) to prevent a person who has attained the age of 21years from contracting a valid marriage, shall be guilty of an offence and shall, on conviction, be liable to imprisonment for a term not exceeding three years or to a fine not exceeding three thousand ringgit or to both."*

[730] Malaysia, Malaysian Islamic Family Law, *Loc. Cit.,* Art.23 (1). *"23. (Polygamy) (1) No man, during the subsistence of a marriage, shall, except with the prior permission in writing of the Court, contract another marriage with another woman nor shall such marriage contracted without such permission be registered under this Act: provided that the Court may if it is shown that such marriage is valid according to Hukum Syarak order it to be registered subject to section 123."*

[731] *Ibid.,* Art.23 (3). *"23. (Polygamy) … (3) An application for permission shall be submitted to the Court in the prescribed manner and shall be accompanied by a declaration stating the grounds on which the proposed marriage is alleged to be just and necessary, the present income of the applicant, particulars of his commitments and his ascertainable financial obligations and liabilities, the number of his dependants, including persons who would be his dependants as a result of the proposed marriage, and whether the consent or views of the existing wife or wives on the proposed marriage have been obtained."*

[732] *Ibid.,* Art. 123. *"123. (Polygamy without Court's permission) Any man who, during the subsistence of a marriage, contracts another marriage in any place without the prior permission in writing of the Court commits an offence and shall be punished with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or both."*

[733] *Ibid.,* Art.14. *"14. (Marriage of a woman) (1) No woman shall, during the subsistence of her marriage to a man, be married to any other man. (2) Where the woman is* janda *– (a) subject to paragraph (c), she shall not, at any time prior to the expiry of the period of 'iddah, which shall be calculated in accordance with Hukum Syarak, be married to any person other than to the man from whom she was last divorced; (b) she shall not be married unless she has produced – (i) a certificate of divorce lawfully issued under the law for the time being in force; or (ii) a certified copy of the entry relating to her divorce in the appropriate register of divorce; or (iii) a certificate, which may, upon her application, be granted after due inquiry by the Syariah Judge having jurisdiction in the place where the application is made, to the effect that she is a* janda*; (c) if the divorce was by* ba-in kubra*, that is to say, three* talaq*, she shall not be remarried to her previous husband, unless she has been lawfully married to some other person and the marriage has been consummated and later lawfully dissolved, and the period of*

The Malaysian Law Reform stipulates that a marriage must be monogamous. Bigamy is a civil marriage crime in Malaysia. If a man is lawfully married under any law, religion or custom to one or more spouses, he is not allowed to contract a valid marriage with another person, whether his previous marriage is contracted within Malaysia or outside Malaysia.[734] Any violation of the monogamy provisions shall be deemed as an offense to re-marry during the life-time if a husband or wife, as the case may be, within the meaning of Section 494 of the Penal Code.[735]If a man lawfully married under any law, religion, custom, or usage shall enter into a marriage with another woman during the continuance of such marriage, such woman shall have no right of succession or inheritance on the death intestate of such man.[736]

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*'*iddah *has expired. (3) If the woman alleges she was divorced before the marriage had been consummated, she shall not, during the ordinary period of 'iddah for a divorce, be married to any person other than her previous husband, except with permission of the Syariah Judge having jurisdiction in the place where she resides. (4) Where the woman is a widow – (a) she shall not be married to any person at any time prior to the expiration of the period of iddah, which shall be calculated in accordance with Hukum Syarak; (b) she shall not be married unless she has produced a certificate of the death of her late husband or otherwise proved his death."* In these provisions, refer to the Art.1 (2) of the Malaysian Islamic Law regarding interpretation, *janda* means a woman who has been married and divorced after consummation, widow means a woman whose husband has died.

[734] Malaysia, Malaysian Law Reform, *Loc. Cit.*, Art.5. *"5. (Disability to contract marriages otherwise than under this Act) (1) Every person who on the appointed date is lawfully married under any law, religion, custom or usage to one or more spouses shall be incapable, during the continuance of such marriage or marriages, of contracting a valid marriage under any law, religion, custom or usage with any other person, whether the first mentioned marriage or the purported second mentioned marriage is contracted within Malaysia or outside Malaysia. (2) Every person who on appointed date is lawfully married under any law, religion, custom or usage to one or more spouses and who subsequently ceases to be married to such spouse or all such spouses, shall, if he thereafter marries again, be incapable during continuance of that marriage of contracting a valid marriage with any other person under any law, religion, custom or usage, whether the second mentioned marriage or purported third mentioned marriage is contracted within Malaysia or outside Malaysia. (3) Every person who on the appointed date is unmarried and who after that marries under any law, religion, custom or usage shall be incapable during the continuance of such marriage of contracting a valid marriage with any other person under any law, religion, custom or usage, whether the first mentioned marriage or the purported second mentioned marriage is contracted within Malaysia or outside Malaysia. (4) After the appointed date, no marriage under any law, religion, custom or usage may be solemnised except as provided in Part III."*

[735]*Ibid.,* Art.7. *"7. (Offence) (1) Any person lawfully married under any law, religion, custom or usage who during the continuance of such marriage purports to contract a marriage under any law, religion, custom or usage in contravene of section 5 shall be deemed to commit the offence of marrying again during the life-time of husband or wife, as the case may be, within the meaning of section 494 of the Penal Code [Act 574]. (2) Where an offence under section 494 of the Penal Code is committed by virtue of subsection (1) by any person in any place outside Malaysia he may be dealt with in respect of that offence as if it had been committed at any place within Malaysia at which he may be found or to which he may have been brought in consequence of any proceeding for his extradition to Malaysia from any place outside Malaysia: Provided that any proceeding against any person under this subsection which would be a bar to subsequent proceeding against him for the same offence if the offence had been committed in Malaysia shall be a bar to further proceedings against him under the Extradition Ordinance 1958 [Ord.2 of 1958]* or in the Commonwealth Fugitive Criminals Act 1967 [Act 54 of 1967] in respect of the same offence outside Malaysia.*"*

Note: The Extradition Ordinance 1958 [Ord. 2 of 1958] and the Commonwealth Fugitive Criminals Act 1967 [Act 54 of 1967] have since been replaced by the Extradition Act 1992 [Act 479]. – See section 54 of Act 479.

[736]*Ibid.,* Art. 6. *"6. (Avoidance of marriage by subsisting prior marriage) (1) Every marriage contracted in contravention of section 5 shall be void. (2) If any male person lawfully married under any law, religion, custom or usage shall during the continuance of such marriage contract another union with any woman, such woman*

Based on the provisions above, Malaysia can be considered to apply the absolute monogamy system and the limited monogamy system. The absolute monogamy system applies to non-Moslem couples, and similar to Indonesia, the limited monogamy system applies to Moslem couples.

1.4.2.3 Minimum age

Pursuant to the Malaysian Islamic Family Law, no Moslem marriage shall be solemnized if the man is under 18 years old or the woman is under 16 years old, unless the *Syariah* Judge has granted his permission in writing under certain circumstances.[737]

The Malaysian Law Reform similarly stipulates that a marriage is considered void if at the date of marriage either party is under 18 years old and the woman is under 16 years old, but an exception may be made if a license is granted by the Chief Minister.[738]

1.4.2.4 Parents' approval

The Malaysian Islamic Family Law requires that consent from the *wali* of the woman or bride. A *wali* is the father or parental grandfather and above. The consent can also be obtained from a Syariah Judge or any person authorized on behalf of the Syariah Judge if no *wali* can be found or the *wali* refuses his consent without any sufficient reason.[739]

The Malaysian Law Reform stipulates that a person who has not reached 21 years old shall obtain written consent of his or her father, and if the person is illegitimate or his or her father has passed away, of his or her mother. For a person who is an adopted child, approval must be obtained from his or her adoptive father, or if the adoptive father has

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shall have no right if succession or inheritance on the death intestate of such male person. (3) Nothing in this section shall affect the liability of any person to pay such maintenance as may be directed to be paid by him under this Act or any other written law."

[737] Malaysia, Malaysian Islamic Family Law, *Loc. Cit.*, Art.8. *"8. (Minimum age for marriage) No marriage may be solemnized under this Act where either the man is under the age of 18 or the woman is under the age of 16 except where the Syariah Judge has granted his permission in writing in certain circumstances."*

[738] Malaysia, Malaysian Law Reform, *Loc. Cit.*, Art.10 jo. Art.21 (2). *"10. (Avoidance of marriages where either party is under minimum age for marriage) Any marriage purported to be solemnised in Malaysia shall be void if at the date of the marriage either party is under the age of 18 years unless, for a female who has completed her 16 year, the solemnisation of such marriage was authorized by a license granted by the Chief Minister under subsection 21 (2)."*

"21. (License) … (2) A valid marriage may be solemnised under paragraph (1) (a) or (b) by a Registrar if a certificate for the marriage issued by the registrar or Registrars concerned or a licence authorizing the marriage is delivered to him."

[739] Malaysia, Malaysian Islamic Family Law, *Loc. Cit.*, Art.13. *"13. (Consent required) A marriage shall not be recognized and shall not be registered under this Act unless both parties to the marriage have consented thereto, and either – (a) the* wali *of the woman has consented thereto in accordance with Hukum Syarak; or (b) the Syariah Judge having jurisdiction in the place where the woman resides or any person generally or specially authorized in that behalf by the Syariah Judge has, after due inquiry in the presence of all parties of all parties concerned, granted his consent thereto as* wali *Raja in accordance with Hukum Syarak; such consent may be given wherever there is no* wali *by nasab in accordance with Hukum Syarak available to act or if the* wali *cannot be found or where the* wali *refuses his consent without sufficient reason."*

passed away, of his or her adoptive mother. If both of his or her parents, either biological or adoptive parents, have passed away, of the person standing in *loco parentis* to him or her before he or she reaches that age. In any other case of marriage, no consent shall be required.[740]

1.4.2.5 Prohibitions

The Malaysian Islamic Family Law stipulates that a Muslim man shall not marry a non-Muslim, except a *Kitabiyah*. In addition, no Muslim woman can marry a non-Muslim man.[741]

In addition to the above, the Malaysian Islamic Family Law also prohibits certain relationship from marrying particularly for the grounds of consanguinity, affinity and fosterage. For instance, no man or woman marries his mother or father, or his mother-in-law or father-in-law. No man also has two wives at one time who are sisters or so related each other.[742]

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[740] Malaysia, Malaysian Law Reform, *Loc. Cit.*, Art.12. *"12. (Requirement of consent) (1) A person who has not completed his or her 21 year, shall, notwithstanding that she shall have attained the age prescribed by the Age of majority Act 1971 [Act 21], nevertheless be required, before marrying, to obtain the consent in writing – (a) of his or her father; (b) if the person is illegitimate or his or her father is dead, of his or her mother; (c) if the person is an adopted child, of his or her adopted father, or if the adopted father is dead, of his or her adopted mother; or (d) if both his or her parents (natural or adopted) are dead, of the person standing in* loco parentis *to him or her before he or she attains that age, but in any other case no consent shall be required. (2) Where the court is satisfied that the consent of any person to a proposed marriage is being withheld unreasonably or all those persons who could give consent under subsection (1) are dead or that it is impracticable to obtain such consent, the court may, on application, give consent and such consent shall have the same effect as if it had been given by the person whose consent was required by subsection (1). (3) An application to the High Court under this section shall be made to a Judge in chambers. (4) When application is made to the High Court in consequence of refusal to give consent, notice of the application shall be served upon the person who refused to give consent. (5) Notwithstanding anything to the contrary in this Part consent to the marriage of a minor shall not be necessary if the minor has been previously married. (6) There shall be no appeal from an order of a Judge under this section."*

[741] Malaysia, Malaysian Islamic Family Law, *Loc. Cit.*, Art.10. *"10. (1) No man shall marry a non-Muslim except a* Kitabiyah. *(2) No woman shall marry a non-Muslim."* In these provisions, refer to the Art.1 (2) of the Malaysian Islamic Law regarding interpretation, *Kitabiyah* means (a) a woman whose ancestors were from *Bani Ya'qub*; or (b) a Christian woman whose ancestors were Christians before the prophethood of the Prophet Muhammad; or (c) a Jewess whose ancestors were Jews before the prophethood of the Prophet Isa.

[742] *Ibid*., Art.9. *"9. (Relationships prohibiting marriage) (1) No man or woman, as the case may be, shall, on the ground of consanguinity, marry – (a) his mother or father; (b) his grandmother or upward, whether on the side of his father or his mother, and his or her ascendants, how-high-soever; (c) his daughter or her son and his granddaughter or her grandson and his or her descendants, how-low-soever; (d) his sister or her brother of the same parents, his sister or her brother of the same father, and his or her brother of the same mother; € the daughter of his brother or sister, or the son of her brother or sister and the descendants, how-low-soever, of the brother or sister; (f) his aunt or her uncle on his father's side and her or his ascendants; (g) his aunt or her uncle on his mother's side and her or his ascendants. (2) No man or woman, as the case may be, shall, on the ground of affinity, marry – (a) his mother-in-law or father-in-law and the ascendants of his wife, how-high-soever; (b) his stepmother or her stepfather, being his father's wife or her mother's husband; (c) his step-grandmother, being the wife of his grandfather or the husband of her grandmother, whether on the side of the father or the mother; (d) his daughter-in-law or son-in-law; (e) his stepdaughter or her stepson and her or his descendants, how-low-soever from a wife or a husband with whom the marriage has been consummated. (3) No man or woman, as the*

The Malaysian Law Reform stipulates that a marriage between a person and his or her grandparent, parent, child, or grandchild, sister or brother, great-aunt or great-uncle, aunt or uncle, niece or nephew, great-niece or great-nephew, as case maybe, shall be prohibited provided that nothing prohibits a person who is a Hindu from marrying under the Hindu law or custom his sister's daughter (niece) or her mother's brother (uncle).[743]

No person shall marry the grandparent or parent, child or grandchild of his or her spouse or former spouse. No person shall marry the former spouse of his or her grandparent or parent, child or grandchild. No person shall marry a person whom he or she has adopted or by who he or she has been adopted. In these prohibitions, the relationship of the half blood is as much an impediment to the relationship of the full blood and it is immaterial whether a person is born legitimate or illegitimate.[744]

The Chief Minister may in his discretion, notwithstanding of the provisions above, grant permission for a marriage to be solemnized if he is satisfied that such marriage is unobjectionable under the law, religion, custom or usage applicable to the parties thereto and, if a marriage is solemnized under such permission, such marriage shall be deemed to be valid.[745]

1.4.2.6 Heterosexual Couple

The Malaysian Islamic Family Law does not expressly mention that a marriage must be between a man and a woman. However, based on the basic principle of the Islamic family law and also as described in the same, a couple in a marriage is between a man and a woman. Therefore, it can be concluded that a couple in a marriage must be a heterosexual couple, or in other words, a same-sex marriage is forbidden.

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case may be, shall, on the ground of fosterage, marry any woman or any man connected with him or her through some act of suckling where, if it had been instead an act of procreation, the woman or man would have been within the prohibited degrees of consanguinity or affinity. (4) No man shall have two wives at any one time who are not so related to each other by consanguinity, affinity, or fosterage that if either of them had been a male a marriage between them would have been illegal in Hukum Syarak."

[743] Malaysia, Malaysian Law Reform, *Loc. Cit.,* Art.11 (1). *"11. (Prohibited relationships) (1) No person shall marry his or her grandparent, parent, child or grandchild, sister or brother, great-aunt or great-uncle, aunt or uncle, niece or nephew, great-niece or great nephew, as the case may be: Provided that nothing in this subsection shall prohibit any person who is a Hindu from marrying under Hindu law or custom his sister's daughter (niece) or her mother's brother (uncle)."*

[744] Malaysia, Malaysian Law Reform, *Loc. Cit.,* Art.11 (2) - (5). *"11. (Prohibited relationships) (2) No person shall marry the grandparent or parent, child or grandchild of his or her spouse or former spouse. (3) No person shall marry the former spouse of his or her grandparents or parent, child or grandchild. (4) No person shall marry a person whom he or she has adopted or by whom he or she has been adopted. (5) For the purposes of this section, relationship of the half blood is as much an impediment as relationship of the full blood and it is immaterial whether a person was born legitimate or illegitimate."*

[745] *Ibid.,* Art.11 (6). *"11. (Prohibited relationships) (6) The Chief Minister may in his discretion, notwithstanding this section, grant a license under this section for a marriage to be solemnized if he is satisfied that such marriage is unobjectionable under the law, religion, custom or usage applicable to the parties thereto and, where such marriage is solemnised under such license, such marriage shall be deemed to be valid."*

In the Malaysian Reform Law, it is stipulated that a marriage must be between a couple consisting of a man and woman. If a marriage is not between a heterosexual couple, such marriage is void.[746]

1.4.3 Solemnization of Marriage

A Muslim Marriage in the Federal Territory shall be in accordance with the provisions of Syariah Law or Islamic Law according to any recognized *Mazhab*). A Muslim marriage must be solemnized by a *wali* in the presence of Registrar, or representative of the *wali* in the presence and permission of the Registrar, or the Registrar as the representative of *wali*. If a woman has no *wali* from her *nasab,* a marriage shall be solemnized by the *wali Raja*.[747]

Each party in the intended marriage shall apply for permission to marry to a Registrar for the *kariah masjid* in which the woman is a resident. When a groom or the man is a resident in a different area, his application shall be accompanied with a statement of the authorized mosque or any other authority stating that he/she has been able to ascertain the matters stated in the application are true. The application shall be treated as a joint application. Based on such application and subject to the satisfaction of marriage requirements, permission to marry shall be granted. No marriage shall be solemnized unless this permission to marry has been given.[748]

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[746] *Ibid.,* Art.69 (d). *"69. (Ground on which a marriage is void) A marriage which takes place after the appointment date shall be void if - … (d) the parties are not respectively male and female."*

[747] Malaysia, Malaysian Islamic Family Law, *Loc. Cit.,* Art.7. *"7. (Person by whom marriages may be solemnized) (1) A marriage in the Federal territory shall be in accordance with the provisions of this Act and shall be solemnized in accordance with Hukum Syarak by – (a) the* wali *in the presence of the Registrar; (b) the representative of the* wali *in the presence and with the permission of the Registrar; or (c) the Registrar as the representative of the* wali*. (2) Where a marriage involves a woman who has no* wali *from* nasab *in accordance with Hukum Syarak, the marriage shall be solemnized only by the* wali Raja.*"* In these provisions, refer to the Art.1 (2) of the Malaysian Islamic Law regarding interpretation, *nasab* means descent based on lawful blood relationship.

[748] *Ibid*., Art.16, 17 and 19. *"16. (Application for permission to marry) (1) Whenever it is desired to solemnize a marriage in the Federal Territory, each of the parties to the intended marriage shall apply in the prescribed form for permission to marry to the Registrar for the* kariah masjid *in which the woman is resident. (2) If the man is resident in a* kariah masjid *different from that of the woman, or is the resident in any State, his application shall bear or be accompanied by a statement of the Registrar of his* kariah masjid *or by the proper authority of the State, as the case may be, to the effect that as far as he has been able to ascertain the matters stated in the application are true. 3(3) The application of each party must be delivered to the Registrar at least seven days before the proposed date of marriage, but the Registrar may allow a shorter period in any particular case. (4) The application of the parties shall be treated as a joint application.* In these provisions, refer to the Art.1 (2) of the Malaysian Islamic Law regarding interpretation, *kariah masjid* means in relation to a mosque, means the area, the boundaries of which are determined under section 75 of the Administration Act.

17. (Issue of permission to marry) Subject to section 18, the Registrar, on being satisfied of the truth of the matters stated in the application, of the legality of the intended marriage, and, where the man is already married, that the permission required by section 23 has been granted, shall, at any time after the application and upon payment of the prescribed fee, issue to the applicants his permission to marry in the prescribed form.

The marriage shall be solemnized in the *kariah masjid* in which the bride resides, but the Registrar or Syariah Judge giving permission to marry may give permission for the marriage to be solemnized elsewhere.[749]Immediately after the solemnization of marriage, the Registrar shall register the marriage in the Marriage Register.[750] Upon registration and payment of the prescribed fee, the Registrar shall issue a marriage certificate to both parties to the marriage.[751] Marriage registration based on this regulation shall not validate nor invalidate the marriage.[752]

A marriage which is not in line with the requirements of the Malaysian Islamic Family Law shall not be valid, and cannot be registered.[753] Any person may report to a registrar of any case in which a marriage is alleged void or a registrable marriage is solemnized in contravention of the Malaysian Islamic Family Law.[754]

The Malaysian Law Reform stipulates that with respect to any person who desires to marry in Malaysia, each party in the intended marriage shall sign and give notice in a designated form in person to a Registrar of the marriage district in which such party has been a resident for the period of seven days. If the parties have been resident for the

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19. (Permission necessary before solemnization) No marriage shall be solemnized unless a permission to marry has been given: - (a) by the Registrar under section 17 or by the Syariah Judge under section 18, where the marriage involves a woman resident in the Federal Territory; or (b) by the proper authority of a State, where the marriage involves a woman resident in that State."

[749]*Ibid*., Art.20 (1). *"20. (Place of marriage) (1) No marriage shall be solemnized except in the* kariah masjid *in which the woman resides, but the Registrar or Syariah Judge giving permission to marry under section 17 or 18 may give permission for the marriage to be solemnized elsewhere, whether in the Federal Territory or in any State."*

[750]*Ibid*., Art.22, 25. *"22. (Entry in Marriage Register) (1) Immediately after the solemnization of a marriage, the Registrar shall enter the prescribed particulars and the prescribed or other* ta'liq *of the marriage in the Marriage Register. (2) The entry shall be attested to by the parties to the marriage, by the* wali*, and by two witnesses other than the Registrar, present at the time the marriage in solemnized.*

25. (Registration) The marriage after the appointed date of every person resident in the Federal Territory and of every person living abroad who is resident in the Federal Territory shall be registered in accordance with this Act.

[751]*Ibid.,* Art.26. *"26. (Marriage certificate and* ta'liq*certificate) (1) Upon registering any marriage. (2) The Registrar shall also, upon payment of the prescribed fees, issue a* ta'liq *certificate in the prescribed form to each of the parties to the marriage."*

[752]*Ibid.,* Art.34. *"34. (Legal effect of registration) Nothing in this Act or rules made under this Act shall be construed to render valid or invalid any marriage that otherwise is invalid or valid, merely by reason of its having been or not having been registered."*

[753]*Ibid.,* Art.11, 12. *"11. (Void marriage) A marriage shall be void unless all conditions necessary, according to Hukum Syarak, for the validity thereof are satisfied."*

"12. (Non-registrable marriage) (1) A marriage in contravention of this Act shall not be registrable under this Act. (2) Notwithstanding subsection (1) and without prejudice to subsection 40 (2), a marriage which has been solemnized contrary to any provision of this Part but is otherwise valid according to Hukum Syarak may be registered under this Act with an order from the Court."

[754]*Ibid.,* Art.27. *"27. (Reporting of void or illegal marriages) it shall be the duty of every person to report to the Registrar the circumstances of any case in which it appears to him that any alleged marriage was void or that any registrable marriage was solemnized in contravention of this Act."*

required period in the same marriage district, only one such notice needs to be given by them.[755]

Upon receipt of such notice, a Registrar shall cause such notice to be published in a conspicuous place at his office visible to the public and shall keep the same so posted up until he grants his certificate or until a period of three months have elapsed, whichever is earlier.[756]

The Registrar shall at anytime after the expiration of 21 days from the date of publication and upon payment to him of the prescribed fee, issue his certificate for marriage in a prescribed form. If the marriage does not take place within six months after the date of publication of the notice, the notice and all proceedings consequently shall be void and a new notice shall be given before the parties can lawfully marry.[757]

Solemnization of marriage is held at the office of a Registrar or other places at such time as may be authorized by a valid license, or at a church or a temple or at any place of marriage at any such time as may be permitted by the religion, custom or usage which the parties to the marriage or either of them profess or practice. The solemnization shall be in the presence of at least two credible witnesses in addition tothe Registrar.[758]

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[755] Malaysia, Malaysian Law Reform, *Loc. Cit.,* Art.14. *"14. (Notice of marriage) Whenever any person desire to marry in Malaysia each of the parties to the intended marriage shall sign and give a notice in the prescribed form in person to the Registrar of the marriage district in which such party has been resident for the period of seven days immediately preceding the giving of such notice: Provided that when both the parties have been resident for the required period in the same marriage district only one such notice need be given by them."*

[756] *Ibid*., Art.15. *"15. (Publication of notice) Upon receipt of such notice, the Registrar shall cause such notice to be published by posting a copy in a conspicuous place in his office visible to public and shall keep the same so posted up until he grants his certificate under section 17 or until three months have elapsed, whichever is the earlier."*

[757] *Ibid.,* Art.17, 18. *"17. (Issue of certificate for marriage) The Registrar, on being satisfied that the declaration complied with the requirements stated in section 16, shall at any time after the expiration of 21 days from the date of publication of the notice under section 15 and upon payment to him of the prescribed fee, issue his certificate for marriage in the prescribed form."*

"18. (Marriage to take place within six months) Subject to section 20, if the marriage does not take place within six months after the date of publication of the notice, the notice and all proceedings consequent thereon shall be void and fresh notice shall be given before the parties can lawfully marry."

[758] *Ibid*., Art.22. *"22. (Solemnization of marriages) (1) every marriage under this Act shall be solemnized – (a) in the office of a Registrar with open doors within the hours of six in the morning and seven in the evening; (b) in such place other than in the office of a Registrar at such time as may be authorized by a valid licence issued under subsection 21 (3); or (c) in a church or temple or at any place of marriage in accordance with section 24 at any such time as may be permitted by the religion, custom or usage which the parties to the marriage or either of them profess or practise.*

(2) A valid marriage may be solemnized under paragraph (1) (a) or (b) by a Registrar if a certificate for the marriage issued by the Registrar or Registrars concerned or a licence authorizing the marriage is delivered to him.

(3) A valid marriage may be solemnized under paragraph (1) (c) by an Assistant Registrar if he is satisfied by statutory declaration that – (a) either – (i)each of the parties is 21 years of age or over, or, if not, is a widower or widow, as the case may be, or (ii) if either party is a minor who has not been previously married and the female party not under the age of 16 years that the consent of the appropriate person mentioned in section 12 has been

After the solemnization, the registrar shall enter the prescribed particulars in the marriage register which shall be attested by the parties to the marriage and by two witnesses other than the registrar present at the solemnization of marriage. All such copies shall be kept by the Registrar General and the Superintendent Registrar in such manner as may be prescribed and shall constitute the marriage register of the Registrar General and the Superintendent Registrar respectively.[759] Marriage registration based on this regulation is an obligation, but it shall not validate nor invalidate the marriage.[760]

1.4.4 Comparison with MA 1974

The Malaysian Islamic Family and Malaysian Law Reform have no definition of marriage, while MA 1974 mentions it in its first article.

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given in writing, or has been dispensed with, or has been given by a court in accordance with section 12; (b) there is no lawful impediment to the marriage; (c) neither of the parties to the intended marriage is married under any law, religion or usage to any person other than the person with whom such marriage is proposed to be contracted; and (d) in so far as the intended marriage is a Christian marriage and is to be solemnized in accordance with the rites, ceremonies or usages or a Christian religious denomination, the provisions of the canons of such religious denomination relating to the publication of banns or the giving notice of the intended marriage have been complied with or lawfully dispensed with in accordance with such canons.

(4) Every marriage purported to be solemnized in Malaysia shall be void unless a certificate for marriage or a licence has been issued by the Registrar or Chief Minister or a statutory declaration under subsection (3) has been delivered to the Registrar or Assistant Registrar, as case may be.

(5) Every marriage shall be solemnized in presence of at least two witnesses besides the Registrar.

(6) No marriage shall be solemnized unless the Registrar is satisfied that both the parties to the marriage freely consent the marriage."

[759] *Ibid.*, Art.31. *"31. (Registration of foreign marriage by a person citizen of or domiciled in Malaysia) (1) Where any person who is a citizen of or is domiciled in Malaysia has contracted a marriage abroad, not being a marriage registered under section 26, such person shall – (a) within six months after the date of such marriage, appear before the nearest or most conveniently available Registrar abroad; and (b) register such marriage. (1A) Where before the expiry of six months under paragraph (1) (a), either or both parties return to Malaysia and the marriage was not registered, such person shall – (a) within six months of arrival in Malaysia, appear before any Registrar; and (b) register such marriage.(1B) A person who applies to register a marriage under subsection (1) or (1A) shall – (a) procedure to such Registrar the certificate of such marriage or such evidence either oral or documentary as may satisfy the Registrar that such marriage took place; (b) furnish such particulars as may be required by the Registrar for the due registration of such marriage; and (c) apply in the prescribed form for the registration of the marriage to be effected and subscribe the declaration therein.*

(2) A Registrar may dispense with the appearance of one of the parties to the marriage if he is satisfied that there exist good and sufficient reason for the absence of such party and in such case the entry in the marriage register shall include a statement of the reason for his or her absence.

(3) Upon the registration of marriage under this section, the Registrar shall deliver the triplicate copy of the register to the parties to the marriage and the original to the Registrar General and the duplicate to the Superintendent Registrar who shall cause such copies to be bound together to constitute for the Foreign Marriages Register.

(4) Where the parties to a marriage required to be registered under this section have not appeared before a Registrar within the period as prescribed in subsection (1), the marriage may, upon application to the Registrar, be registered by him on payment of such penalty as may be prescribed."

[760] *Ibid.*, Art.34. *"34. (Legal effect of registration) Nothing in this Act or rules made under this Act shall be construed to render valid or invalid any marriage that otherwise is invalid or valid, merely by reason of its having been or not having been registered."*

In relation to other requirements, namely consent of the bride and groom, limited polygamous marriage, heterosexual couple, the Malaysian Islamic Family Law, Malaysian Reform Law and MA 1974 require similar conditions.

The minimum age to marry is slightly different for a groom, whereby Malaysia requires a groom to be at least 18 years old while MA 1974 requires 19 years old. In relation to the bride, those three laws require the same minimum age namely 16 years old.

In relation to marriage prohibitions, MA 1974 and the Malaysian Islamic Family Law are quite similar since MA 1974 requires that prohibitions of the religion of the couple are also applied. Compared to the Malaysian Law Reform, MA 1974 has less requirements since it does not impose any prohibitions with regards to adoption.

In relation to solemnization, the Malaysian Islamic Family Law, Malaysian Law Reform and MA 1974 require that a marriage must be registered with the relevant Registrar Office after solemnization. Those laws require registration after the solemnization of marriage, but recognize that registration is not the only requirement for validation.

1.5 Myanmar

Myanmar used to be called as Burma, is the only country where the "Buddhist Law" has become the family law. Burmese Buddhist Law is not codified.[761]There is no Buddhist law applicable to all Buddhists nor is there Buddhist law that can be actually equated with the family law.[762]

Myanmar has the Hindu Family Law (not by the Hindu Code) which applies to persons who profess Hinduism. Similarly, the Muslim Law applies to Muslims who profess Islam. Christians are subject to the British Common Law, along with the Christian Act, 1872, requiring the registration of marriage and the Burma Divorce Act 1896, known as the Christian Marriage Act and Burma Divorce Act.[763]

With regard to marriage and dissolution, family relation as well as inheritance, legal pluralism exists in Myanmar. Ethnic groups including Arakan, Chin, Kachin, Karen, Kayah, Mon and Shan have engaged their own customary practices in family and community matters.

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[761] Aye Kyaw, *Religion and Family Law in Burma,Southeast Program Fellow Cornell University*, available at http://www.siamese-heritage.org/jsspdf/1991/JSS_080_2e_AyeKyaw_ReligionAndFamilyLawInBurma.pdf , accessed on July 21, 2016.

[762] *Ibid*.

[763] *Ibid. See also* Maung Maung, *Law and Custom in Burma and the Burmese Family,* (The Hague: Martinus Nijhoff, 1963), pp.9-36; Adrian Briggs, *Private International Law in Myanmar,* (Oxford: University of Oxford, 2015), pp.15, 149-151.

On August 31, 2015, the government of Myanmar also enacted the Monogamy Bill as stated in Law No.54/15, namely the Law Application of Monogamy System, hereinafter referred to as the "**MM Act 2015**".MM Act 2015 applies to those who live in Myanmar, Myanmar nationals (who are nationals of the Union of Myanmar, including associated citizens or naturalized citizens) who live outside Myanmar and foreigners who marry Myanmar citizens while living in Myanmar.[764] Other laws and regulations, namely the religious law or customary law in relation to a marriage, remain valid provided that they do not contradict MM Act 2015.

An inter-religion marriage between Myanmar Buddhist Woman and Non-Buddhist man is stipulated in the Myanmar Buddhist Women's Special Marriage Law, which was enacted in 2015, hereinafter referred to as the "**MBWS Marriage Law 2015**". The discussion below will focus on MM Act 2015 and MBWS Marriage Law 2015 and Myanmar Buddhist Marriage as the customary law, which make up the majority of the population in Myanmar.

1.5.1 Definition of Marriage

No definition of marriage is stipulated either in MM Act 2015orMBWS Marriage Law 2015.The important element of the Myanmar Buddhist Marriage is consent, or commonly described as consensual contract. It features that Myanmar families have an individual freedom, which covers the freedom of a woman to choose her own spouse.[765]

1.5.2 Capacity to Marry

1.5.2.1 Consent of the parties to a marriage

Based on the Myanmar Customary Law, the most important element of a marriage is consent of the parties to enter into a marriage. Both parties have the freedom of choice for a spouse and choice to enter into a consensual contract.[766]

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[764] Myanmar, Law Application of Monogamy System, Law No.54/15 dated August 31, 2015, Art.2 and 3. *"2. This law concerns all those who are living in Myanmar, Myanmar citizens who live outside of Myanmar, and foreigners who marry Myanmar citizens while in Myanmar.*

3. The following expressions contained in this law shall have the meaning given hereunder: (a) "Citizen" means a citizen of the Union of Myanmar. It also includes an associate citizen or a naturalized citizen. (b) "Inhabitant of Myanmar" means a person who lives in Myanmar permanent or temporarily. (c) "Man" means any male human irrespective of age, old or young. (d) "Woman" means any female human irrespective of age, old or young."

[765] Yee Yee Cho, *Women's Rights under Myanmar Customary Law,* Dagon University Research Journal 2012, Vol.4., p.58.

[766] Yee Yee Cho, *Ibid.*

MBWS Marriage Law 2015 requires consent of both parties to a marriage. The consent to marry must be given voluntary and free from seduction, inducement, coercion, undue influence, fraud or misinterpretation according to MBWS Marriage Law 2015.[767]

1.5.2.2 Monogamy

A polygamous marriage is allowed by the Myanmar customary law. *Dhammathats* allows a man to have more than one wife as long as he can maintain them all together, and the first wife has the same position as the second onward.[768] The reason for a polygamous marriage under the Buddhist customary law and the *Dhammathats*[769] are infertility or incapacity of a wife to bear any child. It can also be the reason for a man to divorce or take another wife. If a husband commits bigamy without any consent from his first wife, the first wife is allowed to refuse to stay together with the second wife and does not lose her rights as the first wife. The Buddhist Women's Special Marriage and Succession Act 1954 are intended to protect the rights of women who have been treated as lesser wives or concubines.[770]

Polyandry is not allowed in Burma. A woman may re-marry after her divorce, provided that she must not have any subsisting marriage. She does not need to obtain the consent of her parents or guardian for the next marriage, even if she is under 20 years old.[771]

Nowadays, a marriage between a man and woman in accordance with any law or any religion or any custom shall be legitimate only if it is a monogamous marriage, as stipulated in MM Law 2015.[772] This provision is applied to a marriage between two

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[767] Myanmar, Myanmar Buddhist Women's Special Marriage Law, *Loc. Cit.*, Art.9(b). *"9. (Person who can marry under this Law) A non-Buddhist man, who has attained the age of 18, and a Buddhist woman, who has attained the age of 18, may contract a valid marriage under this Act if the following facts are fulfilled: … (b) consent to marry shall be voluntary and free from seduction, inducement, coercion, undue influence, fraud or misrepresentation; …"*

[768] Yee Yee Cho, *Ibid.*

[769] Gender Equality Network, *Myanmar Laws and CEDAW, The Case for Anti-Violence Against Women Law, Briefing Paper: Background, Legal Analysis and Case Studies from Cambodia, Thailand and Vietnam*, Gender Equality Network, January 2013, pp.16, available at http://www.burmalibrary.org/docs20/Myanmar_Law+CEDAW-en-red.pdf, accessed on July 21, 2016. *Dhammathats* is derived from the Hindi term *Dharmashatra,* meaning "treatise on laws", a consolidation of customary rules, writings and decisions of previous judges collectively known as the customary law.

[770] *Ibid*.

[771] Aye Kyaw, *Status of Women in Family Law in Burma and Indonesia, Crossroads: An Interdisciplinary Journal of Southeast Asian Studies, Vol.4, No.1, Special Burma Studies Issue (Fall 1988),* (Illinois: Center for Southeast Asian Studies, 1988) *p.103.*

[772] Myanmar, Law Application of Monogamy System, *Loc. Cit.*, Art.4, 5. *"(4) Unless contrary to the provisions of this law, any man or woman can legally enter into a marriage in accordance with the existing law or religion or custom.*

(5) After this law comes into effect, any marriage between a man and a woman in accordance with any law or any religion or any custom shall be legitimate only if monogamous."

Myanmar Buddhists, a Buddhist woman and non-Buddhist man, and two non-Buddhist persons.[773]

Any man or woman who is already married with one spouse or more on the date of enactment of MM Act 2015, and any man or woman who has already married on or after the enactment of MM Act 2015, although their original union or marriage(s) is/are still legally recognized, they are prohibited from entering into another marriage with another person. Otherwise, they are considered to commit an illegal extramarital affair. A man or woman can only re-marry after declaring the previous marriage and showing evidence of legal divorce with his or her previous spouse.[774]

A husband or wife who marries another person while his or her original union is still legally recognized is deemed to commit a matrimonial crime and his or her spouse has the right to seek a divorce. A person who commits a matrimonial crime shall forfeit all of his/her property rights, although it is unclear whether the properties include matrimonial properties acquired prior to the marriage or during the marriage.[775] If a man or woman enters into a marriage while the original union still exists, the latter marriage is considered to be illegal and therefore, the second wife shall not be entitled to any inheritance from her "husband", and vice versa.[776]

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[773] *Ibid.,* Art.6, 7, and 8. *"(6) Any marriage between two Myanmar Buddhists shall be legitimate if it is consistent with Myanmar Customary Law, and as long as it is not contrary to this law.*

(7) Any marriage between a Buddhist woman and a non-Buddhist man shall be legitimate if it is consistent with the Myanmar Buddhist Woman's Special Marriage Law, and as long as it is not contrary to this law.

(8) Any marriage between two non-Buddhists is accordance with their respective law, religion or custom shall be legitimate as long as it is not contrary with this law."

[774] *Ibid.,* Art.9, 10, and 11. *"(9) On the date this law enters into force, any man or woman is already married with one spouse or more than one spouse in accordance with a law or a religion or a custom, shall not enter, while the original union is still legally recognized, into another marriage with another person or conduct an illegal extramarital affair.*

(10) On, or after, the date this law enters into force, any man or woman who is already married in accordance with a law or a religion or a custom, shall not enter, while the original union is still legally recognized, into another marriage with another person or conduct an illegal extramarital affair.

(11) Any man or woman, if he or she was previously married, can enter into another marriage with another person, only after declaring the previous marriage and showing evidence of legal divorce with his or her previous spouse."

[775] *Ibid.,*Art.12, 13, and 14. *"(12) If any husband or wife, while the original union is still legally recognized according to a law or a religion or a custom, marries another person, that person is deemed to commit matrimonial crime.*

(13) Despite whatever contradictories with an existing law or religion or custom, if any husband or wife, while an original union is still legally recognized, marries another person, he or she is deemed to commit a matrimonial crime, and his or her spouse has the right to seek divorce.

(14) In a divorce according to section 13, the person who commits a matrimonial crime shall forfeit all his property rights. (Note from the translator: it is unclear from the Myanmar text whether the provision refers to property acquired prior to marriage or during marriage, whether individually or jointly.)"

[776] *Ibid.,* Art.15. *"(15) If a husband who is married according to a law or a religion or a custom, enters into another marriage with another woman while the original union is still legally recognized such marriage is not*

Any person who enters into a polygamous marriage shall be deemed to commit the act of polygamy or conjugal infidelity under Sec.494 of the Penal Code. If any husband or wife enters into a marriage before he or she can show any legal evidence of divorce with his or her previous spouse, he or she shall be deemed to commit a crime under Sec.495 of the Penal code.[777]

1.5.2.3 Minimal age

The Myanmar Customary Law or Buddhist *Dhammathats* does not state the minimum competent age for a marriage. The main principle is that the parties must be capable with regard to age and mind. It specifies that a man or woman must be "mature". As for women, in particular, maturity is understood as they must be at least 16 years old and they must have their parent's approval. It suggests that parents should give their son and daughter in a marriage when they reach 15 or 16 years old.[778]

Recent writing mentions that a bride must be at least 18 or even older, 20 years old and is steadfastly determined to marry her lover and she continues of the same mind.[779] This is different from the Myanmar Customary Law stating that a woman can marry after reaching 14 years old.[780]In relation to the minimum age to marry without any approval of parents or guardian, scholars mention that the minimum age is 20 years old.[781]

MBWS Marriage Law 2015, particularly for a mixed marriage between a non-Buddhist woman and non-Buddhist man, requires that both parties must reach the age of 18 years old and have never married.[782] The Islamic Law requires a man to be mature, at least reaching puberty. If maturity is not evident, a man must be at least 15 years old. The

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legal and thus the second wife shall not be entitled to inheritance when that husband dies. The husband who marries and lives together with another spouse shall also not be entitled to inheritance if that second wife dies."

[777] *Ibid.,* Art.16, 17. *"(16) If any person, while an original union is still legally recognized according to a law or a religion or a custom, enters into another marriage in contravention to section 9 or section 10 of this law, that person shall be deemed to commit the act of polygamy or conjugal infidelity under section 494 of the Penal Code.*

(17) If any husband or wife violates the provision of section 11, he or she shall be deemed to commit a crime under section 495 of the Penal Code."

[778] Maung Maung, *Op. Cit.,* pp.56-57.

[779] Aye Kyaw, *Status of Women in Family Law in Burma and Indonesia, Op. Cit.,* pp.102-103.

[780] B.K. Sen, *Women and Law in Burma,* Legal Issues on Burma Journal No.9, August 2001, Burma Lawyers' Council, pp.3, available at https://www.ftcam.de/ft_files/Scheidung_Myanmar2.pdf, accessed on August 1, 2016. See also Gender Equality Network, *Op. Cit.*, pp.15-17.

[781] *Ibid.* Maung Maung, *Op. Cit.,* pp.56-57.

[782] Myanmar, Myanmar Buddhist Women's Special Marriage Law, *Loc. Cit.,* Art.9. *"9. (Persons who can marry under this Law) A non-Buddhist man, who has attained the age of 18, and a Buddhist woman, who has attains the age of 18, may contract a valid marriage under this Act if the following facts are fulfilled: (a) both parties shall not be of unsound mind; (b) consent to marry shall be voluntary and free from seduction, inducement, coercion, undue influence, fraud or misrepresentation; (c) if the woman has not attained the age of 20, the consent of parents, or if they are dead, of the guardian* de facto *or of the guardian* de jure, *if any, shall be obtained; (d) the case of a woman, no valid marriage shall subsist; € in the case of a man, no valid marriage shall subsist."*

Hindu Customary Law stipulates no limit on the age of a man to marry, but the minimum age of a woman to marry is 16 years old. The Hindu marriage law stipulates that the minimum age to marry is 18 years old.[783]

1.5.2.4 Parents' approval

The Buddhist customary law allows a woman to marry without her father's consent if she is 20 years old or older. If she is younger than 20 years old but older than 15 years old, she must obtain her father's consent, unless she is a widow. Courts have interpreted the requirement of the father's consent as consent of parents or guardians in general. However, in practice, a girl who has reached the age of 18 years old can marry without her parents' consent before a judge under the *Contract Act.* Girls younger than 15 years old are prohibited from marrying; however, provision on marital rape in the Penal Code suggests otherwise. Men can marry without parental consent once they reach physical maturity (puberty).[784]

Parents' approval must be either expressed or implied. For instance, if a 17-year old girl elopes with a boy, her marriage is rendered to be valid if her relative or guardian does not take any legal action against the marriage. On the other hand, there is an implied parental consent in case that parents know about a daughter's elopement but do not recall her even though they have the right to do so.[785]

1.5.2.5 Prohibitions

A bride and groom must be beyond certain degrees of kinship or affinity. The *Dhammathats* does not define those degrees specifically. Kings enjoyed great laxity in this regard on the excuse that dynastic purity needs to be preserved. Other than royalties, certain proprieties are observed although there is no clear rule to determine the proprieties. The union of uncle and niece, nephew and aunt, half-brother and half-sister, is permitted. A marriage with a deceased wife's sister, in most cases, a younger sister, is considered most proper. The main reason is that children will not be given to a stranger step-mother. With respect to cousins, a union with an agnate is strongly deprecated, while that with another cognate is not looked upon with disfavor, provided the woman is in the same line as the man or below it.[786]

MBWS Marriage Law 2015 and MM Act 2015are silent on this kind of prohibition.

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[783] Maung Maung, *Op. Cit.,* pp.56-57.
[784] *Ibid.*
[785] *Ibid.*
[786] *Ibid.,* pp.56-57.

1.5.2.6 Heterosexual Couple

There is no direct provision that prohibits a same-sex marriage. However, MM Act 2015mentions that a monogamous marriage is a one-husband and one-wife system and subsequently, requirement always mentions that a marriage is between a man and woman regardless of their belief or faith. Requirements for a marriage, also in MBWS Marriage Law 2015, always mention about a relation between a man and woman. Therefore, it can be concluded that a marriage must be between a heterosexual couple, a man and woman.

1.5.3 Solemnization of Marriage

According to the Burmese *dhammathants*, a marriage can be contracted in three ways: (1) marriage directly affected by parents of the parties, (2) marriage contracted through a go-between, and (3) marriage by mutual consent.[787]According to the Myanmar customary law, a marriage is a civil and consensual contract and is not a religious ceremony.[788]

In a Burmese case, a valid marriage can be instituted in two ways, by registration and by "repute". Registration of marriage is effected by a few people, and almost all marriages are legalized by "repute". On the other hand, a mixed marriage is subject to registration. "Repute" is thus an important constituent of a Burmese marriage. Repute is defined as a bare statement by witnesses that the couple as husband and wife are not evidence of such repute.[789] It is the conduct of the parties themselves which can be inferred that they treat each other publicly as husband and wife or the conduct of friends and neighbors treating them as husband and wife which is admissible as evidence of repute. The relationship between the parties must be such that their union shall not be against the sentiments of their community. Secret cohabitation, living together as cousins and the image of being together but unrelated to one's relatives are not permissible.

Marriage registration is stipulated in Art.10-23 of MBWS Marriage Law 2015. The Township General Administration Department shall be the Registrar of Marriages under MBWS Marriage Law 2015.[790] A couple who intend to marry under this law must make

[787] Aye Kyaw, *Status of Women in Family Law in Burma and Indonesia, Loc. Cit.,* p.101. See also Yee Yee Cho, Op.Cit., p.58.

[788] *Ibid.*

[789] *Ibid.* Aye Kyaw, *Status of Women in Family Law in Burma and Indonesia, Op. Cit.,* p.101.

[790] *Ibid.,* Art.10. "(10) Township Administrative Officers of the Township General Administration Department shall be Registrars of Marriage under this Law."

written application accompanied by affidavit stating that the substantive requirements above are fulfilled.[791]

The Registrar will serve a notice to the applicant, on which the couple can solemnize their marriage within 14 days, unless an objection to the marriage is submitted.[792] The solemnization shall be in the presence of 2 witnesses on which the Registrar will issue a Marriage Certificate signed by the parties to the marriage, witnesses, and the Registrar.[793] This marriage certificate shall be valid evidence of the marriage.[794]

In the event an objection is submitted with respect to a marriage, the Registrar shall suspend the marriage and refer it to a court with competent jurisdiction.[795]The court is the authorized institution to examine the objection and issues its decision.

An objection can be submitted by anyone. If the couple do not fulfill the substantive requirements as stated previously, it can be grounds for the objection. The court shall examine the objection if it is submitted within the required period. If by the lapse of such specific period, the objector fails to lodge an objection letter to the court, the

[791] *Ibid.,* Art.11, 13. *"*(11) Whenever a non-Buddhist man and a Buddhist woman intend to contract a marriage, one of them shall apply in writing in the prescribed form to the Registrar within the jurisdiction where one of them is residing. (12) The application shall be accompanied by an affidavit, admitting that the facts provided under section 9 of Chapter 3 are fulfilled. (13) The non-Buddhist man shall sign in the presence of the Registrar and two witnesses that the facts stated in the application are true.*"*

[792] Ibid., Art.14, 15. "(14) (a) The Registrar shall – (1) affix a copy of the application at a conspicuous place in his office; and (2) serve a notice, in accordance with the manner of service of summons or notices under the Code of Civil Procedure – (aa) if the woman to be married is under 20 years of age, on parent or guardian; (bb) if the woman had already married a man, on such man; (cc) if the man had already married a woman, on such woman. (b) If the residence of any person to be served with a copy of the notice is beyond the limits of his jurisdiction, send a copy to him by registered post or by a messenger. (15) Fourteen days after notice of an intended marriage has been given under section 14, such marriage may be solemnized by the Registrar unless it has been previously objected to under sections 16 and 18."

[793] *Ibid*., Art.19, 20, 21. "(19) When the Registrar solemnized a marriage under section 15 or 18, it shall be solemnized in the presence of two witnesses. Both parties shall declare, in the presence or the Registrar and witnesses, that "we are going to live together as lawful husband and wife". (20) When the marriage has been solemnized under section 19, the Registrar shall enter the relevant particulars in "The Marriage Certificate Register". Such register shall be signed by the parties to the marriage, the witnesses and the Registrar. (21) The Registrar shall arrange "The Marriage Certificate" in quadruplicate, and shall deliver one each to both parties. If the wife is under 20 years of age, to her parent or guardian. The third copy shall be kept permanently at the office of District Administrative Officer. The fourth copy and the documents relating to the marriage shall be attached to the Book of Marriage Registration at the Township General Administration Department."

[794] *Ibid.,* Art.23. "(23) Certified copies of documents relating to marriages under this Act shall be received in evidence without further proof."

[795] *Ibid*., Art.16, 17. "(16) Any person may, in writing addressed to the Registrar, object to the intended marriage on the ground that the persons, who submitted application for marriage under section 11, did not comply with one or more of the conditions prescribed in section 9. (17) (a) On receipt of the objection, the Registrar shall refer to the objector to a Court of competent jurisdiction and shall postpone the solemnization of marriage until the order of the Court is obtained. (b) The Court of competent jurisdiction under sub-section (a) shall be the Township Court within which the Office of the Registrar is situated."

objection shall be considered as failed. Based on this fact, marriage solemnization is continued.

If the court finds the objection is valid, it will send its decision to the Township General Administration Department. Based on that decision, the registrar shall not solemnize the marriage.[796]

1.5.4 Comparison with MA 1974

In Myanmar, MM Act 2015 applies to all marriages in Myanmar and each religion has its own marriage law. MBWS Marriage Law 2015 regulates mixed marriages, particularly a couple of Buddhist women and non-Buddhist man.

Those conditions are almost similar to Indonesian conditions because MA 1974 as the national marriage law applies to all Indonesians and allows prohibitions of the religious laws apply to the believers.

According to the Burmese *Dhammathats* (*Damasastra*), a marriage can be contracted in one of three ways, a marriage directly effected by parents by both parties, a marriage contracted through a go-between, and a marriage by mutual consent.[797] According to the Myanmar Customary Law, a marriage is a civil and consensual contract between a couple to live together, while according to MA 1974, a marriage is a relationship of body and soul between a man and woman as husband and wife with the purpose of establishing of a happy and lasting family based on belief in the Almighty God.

[796] *Ibid.,* Art.18. "(18) (a) The objector may file an application before a Court of competent jurisdiction on the ground that the persons who submitted an application for marriage under section 11 did not comply with one or more of the conditions prescribed in section 9. (b) The Court shall issue a certificate the objector that such application has been received. (c) The Registrar shall – (i) not solemnize the marriage of the applicants unless and until an order from the Court is received that the persons have the right to contract a valid marriage, if the certificate issued by the Court under sub-section (b) is lodged by the objector within the specified time; (ii) solemnize the marriage of the applicants if the certificate is not lodged within the specified time; (d) The Court shall, after examining the allegations contained in the application and hearing the evidence produced by the parties in a summary way, decide whether the parties to the intended marriage have the right to contract a valid marriage, and shall pass an order accordingly. Such order shall be final. (e) The Court shall forthwith send a copy of its order to the Registrar. (f) (i) If the Court orders that the parties to the intended marriage have the right to contract a valid marriage, the Registrar shall solemnize the marriage. (ii) If the Court orders that the parties to the intended marriage do not have the right to contract a valid marriage, the Registrar shall not solemnize the marriage."

[797] Kinwungmingyi U Gaung, *A Digest of the Burmese Buddhist Law concerning Inheritance and Marriage; being a collection of texts from thirty-six Dhammathats, composed and arranged under the supervision of the Hon'ble U Gaung, C.S.I. ex_Kinwun Mingyi,* Ranggon: Government Press, 1989, Vol. II, s.36, as quotes by Aye Kyaw in *Status of Women in Family Law in Burma and Indonesia,* Crossroads: An Interdisciplinary Journal of Southeast ASEAN Studies, Vol4, No.1, Special Burma Studies Issue (Fall 1988), pp.100.

Myanmar requires an absolute monogamous marriage, while MA 1974 requires a limited polygamous marriage whereby a man may re-marry only if he has an approval from a district court and his religion allows him to do so.

MBWS Marriage Law 2015 and Myanmar Customary Law require the minimum age of 18 years old of the couple. It is the same as the requirement for a groom in MA 1974, but for a bride, MA 1974 requires lesser, namely 16 years old.

MBWS Marriage Law 2015 and Myanmar Monogamy Act 2015 do not stipulate any prohibition for a person from marrying, as long as the counterpart has an opposite sex. MA 1974 requires that a person cannot marry particular level of his or her blood or affinity relationship, in addition to the heterosexual requirements.

A marriage in Myanmar can be held by any registration at the Registrar office or by repute. A mixed marriage, particularly between a Buddhist woman and non-Buddhist man, must be registered with the relevant Registrar Office. MA 1974 requires that every marriage in Indonesia must be registered, and registration of mixed marriage shall be made by asking a prior court decision.

1.6 The Philippines

The Marriage Law in the Philippines was promulgated on July 6, 1987 under Execution Order No.209. It took effect on August 3, 1988, hereinafter referred to as the "**Philippine Family Code**". This marriage law applies to persons professing the Roman Catholic faith which appear to be the predominant populations, in addition to Christians, Iglesia ni Kristo, Islam, Philippine Independence Church.[798]

1.6.1 Definition of Marriage

A marriage is defined as a special contract of permanent union between a man and woman entered into in accordance with laws for the establishment of conjugal and family life. It is a foundation of the family and an inviolable social institution the nature, consequences and incidents of which are governed by laws and are not subject to stipulation, except that marriage settlement may fix property relation during a marriage within the limits provided by the Code.[799]

[798] Roman Catholic accounts for80% of the population in the Philippines, see https://www.cia.gov/library/publications/resources/the-world-factbook/geos/rp.html , accessed on August 1, 2016.

[799]The Philippines, Family Code, Execution Order No.209 dated July 6, 1987, Art.1. *"1. Marriage is a special contract of permanent union between a man and a woman entered into in accordance with law for the establishment on conjugal and family life. It is the foundation of the family and an inviolable social institution whose nature, consequences, and incidents are governed by law and not subject to stipulation, except that marriage settlements may fix the property relations during the marriage within the limits provided by this Code."*

1.6.2 Capacity to Marry

1.6.2.1 Consent of the parties to a marriage

Consent to enter into a marriage by a groom and bride must be given freely in the presence of the solemnizing officer.[800]

In the event that consent of either party is obtained by fraud, such marriage can be annulled at the time of marriage. Any exception can only be made if such party afterward with full awareness of the facts constituting the fraud remain freely cohabited each other with his/her counterpart as husband and wife.[801] The same case can happen if consent of either party is obtained by force, intimidation or undue influence. Exception can only be made, if after the force, intimidation or undue influence has disappeared, each party thereafter freely cohabits with each other as husband and wife.[802]

1.6.2.2 Monogamy

Under the Philippine Family Code, a marriage must be monogamous. A man and woman must have one spouse at a time. Any bigamy or polygamous or polyandry marriage shall be void from the beginning.[803]

A marriage entered into by a person during the existence of a previous marriage shall be null and void, unless before the celebration of the subsequent marriage, the prior spouse has been absent for four (4) constitutive years and the present spouse has a well-founded belief that the prior spouse has already passed away.[804]

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[800]The Philippine, Family Code, *Loc. Cit.,* Art.2 (2). *"2. No marriage shall be valid, unless these essential requisites are present: … (2) Consent freely given in the presence of the solemnizing officer."*

[801]*Ibid.,* Art.45 (3). *"45. A marriage may be annulled for any of the following causes, existing at the time of the marriage: … (3) That the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabitated with the other as husband and wife; …"*

[802]*Ibid.,* Art.45 (4). *"45. A marriage may be annulled for any of the following causes, existing at the time of the marriage: … (4) that the consent of either party was obtained by force, intimidation or undue influence, unless the same having disappeared or ceased, such party thereafter freely cohabitated with the other as husband and wife; …"*

[803]*Ibid.*, Art.35. *"35. The following marriages shall be void from the beginning: … (4) Those bigamous or polygamous marriages not failing under Article 41; …"*

[804]*Ibid.*, Art.41. *"41. A marriage contracted by any person during subsistence of a previous marriage shall be null and void, unless before the celebration of the subsequent marriage, the prior spouse had been absent for four consecutive years and the spouse present has a well-founded belief that the absent spouse was already dead. In case of disappearance where there is danger of death under the circumstances set forth in the provisions of Article 391 of the Civil Code, an absence of only two years shall be sufficient. For the purpose of contracting the subsequent marriage under the preceding paragraph the spouse present must institute a summary proceeding as provided in this Code for the declaration of presumptive death of the absentee, without prejudice to the effect of reappearance of the absent spouse."*

1.6.2.3 Minimum age

The minimum age to enter into a marriage is 18 years old.[805] A marriage between any party under18 years of age even with the consent of parents or guardian shall be void from the beginning.[806]

1.6.2.4 Parents' approval

A party under or between 21-25 years old is obligated to ask advice from his/her parents or guardian upon the intended marriage. If they do not obtain such advice, or if it is unfavorable, a marriage license shall not be issued until three (3) months following the completion of publication of the application thereof. A sworn statement by the contracting parties to the effect that such advice has been sought, together with the written advice given, if any, shall be attached to application for a marriage license. Should the parent or guardian refuses to give any advice, this fact shall be stated in the sworn statement.[807]

This stipulation consists of the Philippine traditions of "*pamanhikan*", which literally has the meaning go to the house of the bride to ask for her hand in marriage. This tradition is about a couple to honor their elders by seeking their approval or advice prior to a marriage.[808] In addition advice from parents and elders, a couple must undergo a marriage counseling which is certified by a priest or by a marriage counselor duly accredited by the government agency.

Absence of any of the essential or formal requirements shall result in a void (*void in initio*) marriage. A defect in any of the essential requirements shall not affect the validity of marriage but the party(ies) to the marriage is/are responsible for the irregularities and shall be civilly, criminally and administratively liable.[809]

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[805] *Ibid.*, Art.5. *"5. Any male or female of the age of 18 years or upwards not under any of the impediments mentioned in Article 37 and 38, may contract marriage."*

[806] *Ibid.*, Art.35. *"35. The following marriages shall be void from the beginning: (1) Those contracted by any party below eighteen years of age even with the consent of parents or guardians; …"*

[807] *Ibid.*, Art.15. *"15. Any contracting party between the age of twenty-one and twenty-five shall be obliged to ask their parent or guardian for advice upon the intended marriage. If they do not obtain such advice, or if it be unfavourable, the marriage license shall not be issued till after three months following the completion of the publication of the application therefore. A sworn statement by the contracting parties to the effect that such advice has been sought, together with the written advice given, if any, shall be attached to the application for marriage license. Should the parents or guardian refuse to give any advice, this fact shall be stated in the sworn statement."*

[808] Emmanuel Caliwan, *Family Law in the Philippine An Overview*, at http://www.academia.edu/4102315/Family_law_in_the_Philippines_An_Overview, pp.6 accessed on July 18, 2016.

[809] The Philippines, Family Code, *Loc. Cit.*, Art.4. *"4. The absence of any of the essential or formal requisites shall render the marriage void* ab initio*, except as stated in Article 35 (2). A defect in any of the essential*

A marriage may be annulled at the time of marriage if the marriage is solemnized without any consent of the parents, guardian or person having substitute parental authority over the party, provided that the party in whose behalf it is sought to have the marriage annulled is eighteen years old or over but under twenty-one years old. An exception could only be made if after reaching the age of twenty-one years old, such party freely cohabits with another person and both lived together as husband and wife.[810]

1.6.2.5 Prohibition

A marriage between any party who, at the time of celebration, is psychologically incapacitated to comply with the essential marital obligations of marriage, shall likewise be void even if such incapacity becomes manifest only after its solemnization.[811]

A marriage between an ascendant and descendant of any degree; and between a brother and sister, whether of full or half-blood, legitimate or illegitimate is incestuous and void from the beginning.[812]

A marriage is void from the beginning for the reason of public policy, when it is between collateral blood relatives whether legitimate or illegitimate, up to the fourth civil degree, between a step-parent and step-child, between a parent-in-law and child-in-law, between an adoptive parent and adopted child, between a surviving spouse of the adopted child and adopter, between an adopted child and a legitimate child of the adopter, between an adopted child of the same adoptive parent, and between parties where one, with the intention to marry the other, kills that other person's spouse, or his or her own spouse.[813]

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requisites shall not affect the validity of the marriage but the party or parties responsible for the irregularity shall be civilly, criminally and administratively liable."

[810] *Ibid.,* Art.45 (1). *"A marriage may be annulled for any of the following causes, existing at the time of the marriage: (1) The party in whose behalf it is sought to have the marriage annulled was eighteen years of age or over bet below twenty-one, and the marriage was solemnized without the consent of the parents, guardian or person having subtitle parental authority over the party, in that order, unless after attaining the age of twenty-one, such party freely cohabitate with the other and both lived together as husband and wife; …"*

[811] *Ibid.,* Art.36. *"36. A marriage contracted by any party who, at the time of the celebration, was psychologically incapacitated to comply with the essential marital obligations of marriage, shall likewise be void even if such incapacity becomes manifest only after its solemnization."*

[812] *Ibid.,* Art.37. *"37. Marriage between the following are incestuous and void from the beginning, whether relationship between the parties be legitimate or illegitimate: (1) between ascendants and descendants of any degree; and (2) between brothers and sisters, whether of the full or half blood."*

[813] *Ibid.,* Art.38. *"38. The following marriages shall be void from the beginning for reasons of public policy: (1) between collateral blood relatives whether legitimate or illegitimate, up to the fourth civil degree; (2) between step-parents and step-children; (3) between parents-in-law and children-in-law; (4) between the adopting parents and the adopted child; (5) between the surviving spouse of the adopting parent and the adopted child; (6) between the surviving spouse of the adopted child and the adopter; (7) between an adopted child and a legitimate child of the adopter; (8) between adopted children of the same adopter; and (9) between parties where one, with the intention to marry the other, killed that other person's spouse, or his or her own spouse."*

1.6.2.6 Heterosexual Couple

The Philippine Family Code requires that a marriage must be between a man and woman.[814] A same-sex marriage as well as civil union or domestic partnership is prohibited in the Philippines.

1.6.3 Solemnization of Marriage

A marriage is valid if such marriage is formalized by the authority of the solemnizing officer and has a valid marriage license. A marriage ceremony must take place before the solemnizing officer, in the attendance of the contracting parties and upon their personal declaration that they take each other as a husband and wife in the presence of not less than two credible witnesses.[815]

Absence of any of the essential or formal requisites shall render the marriage void *ab initio*, including one solemnized by any person not legally authorized to hold a marriage unless such marriage is contracted with either or both parties believing in good faith that the solemnizing officer has the legal authority to do so.[816]

1.6.4 Comparison with MA 1974

The Philippine Family Code defines a marriage as a special contract of permanent union between a man and woman entered into in accordance with laws for the establishment of conjugal and family life. It is a foundation of the family and an inviolable social institution the nature, consequences and incidents of which are governed by the Philippine Family Code. Indonesia in MA 1974 gives a slightly similar definition, namely a marriage is a relation between a man and woman to establish a happy family and household. The basis of marriage is the only difference in definition, as Indonesia relies on marriages to the value of religion as reflected in the phrase *"... based on the Almighty God."*

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[814] *Ibid.*, Art.2 (1). *"2. No marriage shall be valid, unless these essential requisites are present: (1) Legal capacity of the contracting parties who must be a male and a female; and …."*

[815] *Ibid.*, Art.3. *"3. The formal requisites of marriage are: (1) Authority of the solemnizing officer; (2) A valid marriage license except in the cases provided for in Chapter 2 of this Title; and (3) A marriage ceremony which takes place with the appearance of the contracting parties before the solemnizing officer and their personal declaration that they take each other as husband and wife in the presence of not less than two witnesses of legal age."*

[816] *Ibid.*, Art.4 jo. Art.35 (2). For Art.4 of the Philippine Family Code, please see the footnote above. *"Art.35 (Void and voidable marriages) The following marriages shall be void from the beginning … (2) Those solemnized by any person not legally authorized to perform marriages unless such marriages were contracted with either or both parties believing in good faith that the solemnizing officer had the legal authority to do so; …"*

The Philippine Civil Code requires that the minimum age of 18 years old of the couple. It is the same as the requirement of a groom in MA 1974, but for a bride, MA 1974 requires lesser, namely 16 years old.

In relation to prohibitions and heterosexual requirement, the Philippine Family Code and MA 1974 have the same requirements. The Philippine Family Code and MA 1974 require that a couple must obtain parents' approval. In relation to the minimum age to marry, the Philippine Family Code has a slightly higher requirement, between 21-25 years old, while MA 1974 requires a couple to be 21 years old, and in certain cases, 18 and 16 years old. In relation to solemnities, the Philippine Family Code and MA 1974 similarly require that a marriage must be registered. In the Philippines, the registration is the point of validation, while MA 1974 stipulates that registration is a must but it is not the only point of validation.

1.7 Singapore

The Marriage Law in Singapore is stipulated in the prevailing law known as the Women's Charter. It was promulgated in 1961 as Ordinance 18 of the State of Singapore. Its enactment substitutes diverse marriage laws that are previously applied to different ethnics and religious affiliations, the Chinese customary law, the Hindu religious marriage law, the Sikh religious marriage law, the Jewish marriage law as well as the civil marriage statute and the Christian marriage statute.

Since the formation of the Republic of Singapore in 1965, there are significant amendments to the Women's Charter 1965 with the latest one made in 2016.[817] This Women's Charter remains the core of the family law that regulates all Singaporeans and also people domiciled in Singapore, except those who have married under the Muslim marriage law.[818]

[817] Respectively, amendments in the last 5 years are the Women's Charter (Amendment) Act, No.2 of 2011 with effect from June 1, 2011 and September 1, 2011, the Women's Charter (Amendment) Act, No.25 of 2012 with effect from March 28, 2013, the Women's Charter (Amendment) Act, No.27 of 2014 with effect from October 1, 2014 and January 1, 2015, the Women's Charter (Amendment) Act, No.7 of 2016 with effect from July 1, 2016.

[818] Singapore, the Women's Charter, Sec.3. *"3. (Application) (1) Except as otherwise provided, this Act shall apply to all persons in Singapore and shall also apply to all persons domiciled in Singapore. (2) parts II to VI and Part X and sections 181 and 182 shall not apply to any person who is married under, or to any marriage solemnized or registered under, the provisions of the Muslim law or of any written law in Singapore or in Malaysia providing for the registration of Muslim marriages. (2A) Nothing in Part VIII entitles an incapacitated husband who is married under the provisions of the Muslim law, or of any written law in Singapore or in Malaysia providing for the registration of Muslim marriages, to obtain any maintenance under that Part. (3) Notwithstanding subsection (2), sections 4, 5, and 6 shall apply to any person who contracts or purports to contract any such marriage during the subsistence of a marriage registered or deemed to be registered under the provisions of this Act or which was contracted under a law providing that or in contemplation of which the marriage is*

1.7.1 Definition of Marriage

The Singaporean Marriage law, so-called as the "**Women's Charter**", does not define what marriage is. The closest definition of marriage is the term "monogamous marriage" as stated in the Interpretation Act, section 2, namely *"Monogamous marriage" means a marriage which is recognized by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all other during the continuance of the marriage.*"

Such definition of marriage advises some prescription of marriage and reference to law of the place where the marriage is formed. Leong Wai Kum mentions that the reference of law as stated above can be added to the law of place where the marriage takes place and the law of domicile of the parties or one of the parties' domicile at the time of marriage solemnization.[819]

In Singapore, marriage can be derived from three statements drawn from several statutory provisions that regulate the formation of marriage and the marital relationship that is thereby formed. First, a marriage involves a mutual commitment. It requires a commitment to an exclusive marital relationship.[820] Second, a marriage is an equal co-operative partnership whereby the parties' commitment makes them equal members in partnership of cooperative efforts for their mutual benefits. Each partner contributes their efforts and both mutually benefit from these. Third, a marriage continues until death unless earlier terminated by a court.[821]

Such statements help in understanding a marriage within the law. Being a mere statement, it still does not convey the completeness of relationship that a spouse shares nor does it conveys the value of a stable marriage to the public society and the raising of children.[822]

1.7.2 Capacity to Marry

1.7.2.1 Consent of the parties to a marriage

The Woman's Charter informs that a marriage requires a commitment to an exclusive marital relationship. Every party to a marriage must freely consent to enter into the

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monogamous. (4) No marriage between persons who are Muslims solemnized or registered under this Act. (5) For the purpose of this Act, a person who is a citizen of Singapore shall be deemed, until the contrary is proved, to be domiciled in Singapore."

[819] Leong Wai Kum, *Elements of Family Law in Singapore*, 2nd Ed. (Singapore: LexisNexis, 2012), pp.3-4.

[820] *Ibid*. This commitment to a monogamous marriage is only allowed for two adults who are 18 years old or older, and not related to each other regarding close for marriage, male and female respectively, and both are not Muslim since two Muslim should marry under the Muslim marriage law.

[821] *Ibid.*

[822] *Ibid*.

marriage, without any suppression from any third parties or deception. The person who solemnizes a marriage must be satisfied with these conditions before solemnizing the marriage.[823] Therefore, at some point, a licensed marriage official should request each party to declare his/her willingness to take the other party as a spouse during a matrimonial ceremony. This declaration is made to assure the official that the parties freely consent to marry each other.

Mutual consent free from any force is important, thus any party who forces or threats to compel a person to marry against his/her own will or, in contrary, to prevent a person who has reached the age of 21 years old from marrying, shall be guilty of an offence and liable to a maximum conviction of $3000 or to a maximum imprisonment for three years or both.[824]

1.7.2.2 Monogamy

The Women's Charter clearly prohibits a Singaporean man to enter into a polygamous marriage either in Singapore or abroad.[825] Under the Women's Charter, a man who is already married does not possess the capacity to marry a woman who is not his wife whether he attempts to marry this woman under the Woman's Charter itself or under some other marriage laws including one that may not impose the same restriction upon him.[826]

The prohibition from re-marrying in Singapore is administered by the Registrar of Marriages. If a married man gives a notice of intention to marry another woman under the Women's Charter, he will not be issued a marriage license. If a court in Singapore adjudges such an attempt outside Singapore, it will decide that the attempt is futile because it is prohibited by the Women's Charter.[827]

If a male who is lawfully married, re-marries with another woman, that woman will have no right of succession or inheritance on the death intestate of such male person.[828] If a

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[823] Singapore, *Loc. Cit.,* Sec.22 (3). *"22. (Requirements for valid marriage) … (3) No marriages shall be solemnized unless the person solemnizing the marriage is satisfied that both the parties to the marriage freely consent to the marriage."*

[824] *Ibid.,* Sec.36. *"36. (Interference with marriage) Any person who uses any force or threat – (a) to compel a person to marry against his will; or (b) to prevent a person who has attained the age of 21 years from contracting a valid marriage, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $3,000 or to imprisonment for a term not exceeding 3 years or to both."*

[825] *Ibid.,* Sec.11. *"11. (Avoidance of marriages by subsisting prior marriage) A marriage solemnized in Singapore or elsewhere between person who, at the date of the marriage, is married under any law, religion, custom or usage to any other person shall be void."*

[826] Leong Wai Kum, *Loc. Cit.*, pp.27.

[827] *Ibid.*

[828] *Ibid.*, Sec.5 (2). *"5. (Void marriage). … (2) If any male person lawfully married under any law religion, custom or usage shall, during the continuance of that marriage, contract a union with a woman, that woman shall have no right of succession or inheritance on the death intestate of such male person."*

married man tries to enter into a marriage in Singapore or elsewhere under any law, religion, custom, he will be deemed to commit the offense of re-marrying during the lifetime of husband and wife, which is subject to jail and fine.[829]

1.7.2.3 Minimal age

The minimum age of marriage is 18 years old.[830] This minimum requirement is attached to parents' approval. Parents' approval is required if a bride or groom is under 21 years old. If a bride is older than 21 years old, she can enter into a marriage without her parents' approval.

A bride under the age of 18 years old lacks the capacity to marry except that the Minister of Social and Family Development may, in his/her discretion, authorize such a young person to marry as he/she waives this particular requirement to marry.[831]

1.7.2.4 Parents' approval

Parents' approval is required if a bride or groom is under 21 years old. If a bride is older than 21 years old, she can enter into a marriage without parents' approval.

A bride under the age of 18 years old lacks the capacity to marry although the Minister of Social and Family Development may, in his/her discretion, authorize such a young person to marry as he/she waives this particular requirement to marry.[832]

The requirement of minimum age is different from the requirement of a person who is under the age of 21 years old to obtain parents' consent to marry. The minimum age is the substantive requirement of marriage, while parents' approval is the formality of solemnization.

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[829] *Ibid.,* Sec.6. *"6. (Offence) Any person lawfully married under any law, religion, custom or usage who during the continuance of that marriage purports to contract a marriage in Singapore or elsewhere under any law, religion, custom or usage in contravention of section 4 shall be deemed to commit the offence of marrying again during the lifetime of the husband or wife, as the case may be, within the meaning of section 494 of the Penal Code (Cap.224)."*

Singapore, the Penal Code, Sec.494. *"Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment for a term which may extend to 7 years, and shall also be liable to fine."*

[830] Singapore, the Women's Charter, *Loc. Cit.,* Sec.9 of. *"9. (Avoidance of marriages where either party is under minimum age for marriage) A marriage solemnized in Singapore or elsewhere between persons either of whom is below the age of 18 years shall be void unless the solemnization of the marriage was authorised by a special marriage license granted by the Minister under section 21."*

[831] *Ibid.*, Sec.21 (2). *"21. (Special marriage license) … (2) The Minister may, in his discretion, grant a special marriage licence under this section authorising the solemnization of a marriage although any party to the marriage is below the age of 18 years."*

[832] *Ibid.,* Sec.21 (2).

1.7.2.5 Prohibition

For a groom and bride, they are prohibited from marrying a person who has a close family relationship. The Women's Charter details it for a groom and bride. A groom is prohibited from marrying a woman who is his close family.[833] The same case also applies to a bride.[834]

1.7.2.6 Heterosexual Couple

The Women's Charter provides for that two people cannot marry each other unless they are of different sexes, thus only a heterosexual couple may marry. Section 12 (1) of the Women's Charter mentions unequivocally that a marriage between persons who at the date of marriage, are not respectively a male and female shall be void.[835]

The Women's Charter mentions firmly that a valid marriage must be between two persons of different sexes. The sex of the person for this purpose must be stated at the time of marriage in his/her identity card issued based on the National Registration Act, while a non-Singaporean who does not possess any identity card and a person who has undergone a sex reassignment surgery shall be identified as being of the sex to which the person has been re-assigned.[836]

Section 12 (3) of the Women's Charter which was added in 1996 gives a legal recognition of sex re-assignment surgery for the purpose of fulfilling the statutory

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[833] The First Schedule of the Women´s Charter. The groom is prohibited to marry a woman who is his mother, daughter, father´s mother, mother´s mother, son´s daughter, daughter´s daughters, sister, wife´s mother, wife´s daughter, father´s wife, son´s wife, father´s wife, mother´s father´s wife, wife´s father´s mother, wife´s mother´s mother, wife´s son´s daughter, wife´s daughter´s daughter, son´s wife, daughter´s son´s wife, father´s sister, mother´s sister, brother´s daughter, sister´s daughter.

[834] *Ibid.*The bride is prohibited to marry her father, son, father´s father, mother´s father, son´s son, daughter´s son, brother, husband´s father, husband´s son, mother´s husband, daughter´s husband, father´s mother´s husband, mother´s husband, husband´s father´s father, husband´s mother´s father, husband´s son´s son, husband´s daughter´s son, son´s daughter´s husband, daughter´s husband, father´s brother, mother´s brother, brother´s son, sister´s son.

[835] *Ibid.,* Sec.12 (1). *"12. (Avoidance of marriages between persons of same sex) (1) A marriage solemnized in Singapore or elsewhere between persons who, at the date of the marriage, are not respectively male and female shall be void."*

[836] *Ibid.*, Sec.12. *"12. (Avoidance of marriages between persons of same sex) (1) A marriage solemnized in Singapore or elsewhere between persons who, at the date of the marriage, are not respectively male and female shall be void. (2) It is hereby declared that, subject to sections 5, 9, 10, 11 and 22, a marriage solemnized in Singapore or elsewhere between a person who has undergone a sex reassignment procedure and any person of the opposite sex is and shall be deemed always to have been a valid marriage. (3) For the purpose if this section – (a) the sex of any party to a marriage as stated at the time of the marriage in his or her identity card issued under the National Registration Act (Cap.201) shall be prima facie evidence of the sex of the party; and (b) a person who has undergone a sex re-assignment procedure shall be identified as being of the sex to which the person has been re-assigned. (4) Nothing in subsection (2) shall validate any such marriage which had been declared by the High Court before 1st May 1997 to be null and void on the ground that the parties were of the same sex."*

prescription of parties being of different sex.[837] Suffice to remark that HMO will register the marriage and accept the information whether a person is a man or woman according to his or her legal identity card without any further examination if the person concerned has undergone a sex re-assignment operation.

1.7.3 Solemnization of Marriage

The solemnization of marriage shall be made by a Registrar or any other person to whom a license to solemnize a marriage is granted by the Minister.[838]

Whenever any person desires to marry in Singapore, one of the parties to the intended marriage shall sign and give to a Registrar a designated form. If the person is unable to write or insufficiently acquainted with English language, or both, it will suffice if he places his mark or cross thereon in the presence of a literate person.[839]

Upon receipt of the notice above, a Registrar shall cause the notice to be filed serially by electronic media or other means. The Registrar shall also cause a computer print-out or summary of all notices filed during the day to be displayed in an electronic terminal in a conspicuous place at his/her office and shall keep the same so displayed until he issues a marriage license or until 3 months have lapsed.[840]

The Registrar shall, at anytime after the expiration of 21 days and before the expiration of 3 months from the date of notice and upon payment, issue a marriage license. The Registrar shall not issue a marriage license until he/she has been satisfied by a statutory declaration made by each of the parties to the proposed marriage, that they fulfill all of the requirements with regard to, among others, minimum age and status.[841]

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[837] Leong Wai Kum, *Loc. Cit.*, pp.36.

[838] Singapore, the Women's Charter, Sec.8. *"8. (Persons by whom marriages may be solemnized) (1) a marriage may be solemnized by the registrar or any other person to whom a licence to solemnize marriage under this section has been granted by the Minister. (2) The Minister may grant a licence to any suitable person to solemnize marriages in Singapore."*

[839] *Ibid.,* Sec.14, 15. *"14. (Notice of marriage) Whenever any persons desire to marry in Singapore, one of the parties to the intended marriage shall sign and give to the registrar a notice in the prescribed form."*

"15. (Signature on notice by person unable to write or to understand English language) If the person giving the notice under section 14 is unable to write or is insufficiently acquainted with the English language, or both, then it shall be sufficient if he places his mark or cross thereon in the presence of some literate person who shall attest the same, which attestation shall be in the prescribed form."

[840] *Ibid.,* Sec.16. *"16 (Notice to be filed and published) (1) Upon receipt of a notice under section 14, the Registrar shall cause the notice to be filed serially by electronic media or other means. (2) The Registrar shall also cause a computer print-out or summary of all notices filed during the day to be displayed in an electronic terminal in a conspicuous place in his office and shall keep the same do displayed until he issues a marriage licence under section 17, or until 3 months have elapsed."*

[841] *Ibid.,* Art.17. *"17. (Registrar to issue marriage licence on proof of conditions by statutory declaration) (1) The Registrar shall, at any time after the expiration of 21 days and before the expiration of 3 months from the date of the notice and upon payment of the prescribed fee, issue a marriage licence in the prescribed form. (2) The Registrar shall not issue a marriage licence until he has been satisfied by statutory declaration made by each*

If the marriage does not take place within 3 months after the date of notice, the notice and all proceedings consequent thereupon shall be void, and a new notice shall be given before the parties can lawfully marry.[842]

If any caveat is entered against the issue of a marriage license, provided that the caveat contains the name, residence and ground for objection of caveat, the Registrar shall not issue a marriage license. After the Registrar examines the caveat or the caveat is withdrawn by the person concerned, he/she can proceed with the issuance of a marriage license. In case of doubt, the Registrar can refer the caveat to a court. If the registrar refuses to issue a marriage license, the person applying for the marriage shall have the right to appeal to a court, without any chance to re-appeal.[843]

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of the parties to the proposed marriage – (a) that, where any party to the intended marriage is not a citizen or permanent resident of Singapore, at least one of the parties has been physically present in Singapore for a period of at least 15 days preceding the date of the notice; (b) that – (i) each of the parties is 21 years of age or above, or, if not, is divorced or is a widower or widow or has had his or her previous marriage declared null and void, as the case may be; or (ii) if either party is a minor who has not been previously married – the consent of the appropriate person mentioned in the Second Schedule has been given in writing, or has been dispensed with, or the consent of the court has been given in accordance with section 13; (c) that neither party is below the age of 18 years; (d) that there is no lawful impediment to the marriage; € that neither of the parties to the intended marriage is married under any law, religion, custom or usage to any person other than the person with whom such marriage is proposed to be contracted; and (f) that, where any party to the intended marriage is a person to whom section 17A applies, both parties have attended and completed a marriage preparation programme.

(2A) Where one of the parties to the proposed marriage has been previously married but is divorced, the Registrar shall not issue a marriage licence unless that party also states, in the statutory declaration referred to in subsection (2), whether that party owes any arrears in respect of any maintenance which is payable under a maintenance order."

(2B) The statutory declaration referred to in subsection (2) shall be made by each party to the proposed marriage in the presence of the other party.

(3) If any party giving a notice of marriage or making a statutory declaration does not understand the English language, the registrar shall, before issuing the marriage licence, ascertain whether that party is cognizant of the purport of the notice or declaration and, if not, shall interpret or cause to be interpreted the notice or declaration to that party into some language which that party understands.

(4) in this section – "maintenance order" means – (a) an order for the payment of a monthly allowance made or deemed to be made by a court under Part VIII; (b) an order for the payment of periodical sums by way of maintenance or alimony to a wife or former wife or an incapacitated husband or incapacitated former husband, or by way of maintenance for the benefit of any child, under Part X; (c) an order for maintenance made by the Syariah *Court under the Administration of Muslim Law Act (Cap.3); or (d) a maintenance order as defined in section 2 of the Maintenance Orders (Facilities for Enforcement) Act (Cap. 168) or section 2 of the Maintenance Orders (Reciprocal Enforcement) Act (Cap.169); "marriage preparation programme" has the same meaning as in section 17A(3); "permanent resident of Singapore" means a person who holds an entry permit under section 10 of the Immigrant Act (Cap.133) or a re-entry permit under section 11 of that Act.*

[842]*Ibid., Sec.*18. *"18. (Marriage to take place within 3 months) If the marriage does not take place within 3 months after the date of the notice, the notice and all proceedings consequent thereupon shall be void, and fresh notice shall be given before the parties can lawfully marry."*

[843]*Ibid.,* Sec.20. *"20. (Proceeding if caveat entered) (1) if a caveat is entered in accordance with section 19, the Registrar shall not issue a license for the marriage against which the caveat has been entered unless – (a) after examining into the matter of the said objection, the Registrar is satisfied that it ought not to obstruct the issue of the licence for the marriage; or (b) the caveat is withdrawn by the person who entered it. (2) In the cases of doubt, it shall be lawful for the registrar to refer the matter of any caveat referred to in subsection (10 to the court which shall decide upon the same. (3) Where the Registrar has refused to issue the marriage licence, the*

The Minister may grant a special marriage license, whereby such power may be delegated to any person as he/she may think fit. The special marriage license will be issued to a couple who meet the requirements for it, among others, a couple under 18 years old who finish the preparation marriage program pursuant to Sec.17A of the Women´s Charter.[844]

Every marriage in Singapore shall be void unless it is solemnized on the authority of a valid marriage license issued by a Registrar or a valid special marriage license granted by the Minister and by a registrar or person who has been granted a license to solemnize a marriage. The solemnization must be in the presence of 2 credible witnesses.[845]

A Religious Ceremony may take place, provided that the couple present themselves for that purpose to a clergyman, minister or priest of such church or temple, by giving a notice to the clergyman, minister or priest of their intention to do so. The clergyman, minister or priest, upon the production of a certified copy of marriage certificate, may read or celebrate marriage services of the church or temple to which he/she belongs.[846]

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person applying for the same shall have a right to appeal the court which shall thereupon either confirm the refusal or direct the issue of the marriage licence. (4) The court may examine the allegations contained in the caveat in a summary way and may hear evidence in support of and in opposition to the objection. (5) The proceedings under this section shall be before a judge in chambers. (6) There shall be no appeal from a decision of a judge under this section. (7) If the Registrar or the court declares the ground of objection to be frivolous and such as ought not to obstruct the issue of the marriage licence, the person entering the caveat shall be liable for the costs of all proceedings relating thereto and for damages to be recovered by suit by the party against whose marriage the caveat was entered."

[844]*Ibid.,* Sec.21. *"21. (Special marriage licence) (1) The Minister may, if he thinks fit, dispense with the giving of notice and with the issue of a marriage license, and may grant a special marriage licence in the prescribed form authorising the solemnization of a marriage between the parties named – (a) upon proof being made to him by statutory declaration – (i) that there is no lawful impediment to the proposed marriage; and (ii) where any party to the proposed marriage is a person to whom section 17A applies, that both parties to the proposed marriage have attended and completed marriage preparation programme; (b) where one party to the proposed marriage has been previously married but is divorced, upon a statutory declaration being furnished by the party as to whether that party owes any arrears in respect of any maintenance which payable under a maintenance order; and (c) upon his being satisfied that the necessary consent, if any to marriage has been obtained, or that the consent has been dispensed with or given under section 13. (2) The Minister may, in his discretion, grant a special marriage licence under this section authorizing the solemnization of a marriage although any party to the marriage is below the age of 18 years. (3) If the marriage authorised by a special marriage licence under this section is not solemnized within one month from the date of the licence, the licence shall become void. (4) The Minister may delegate his powers under this section to any person, subject to such condition as he may think fit to impose. (5) In this section, "maintenance order" has the same meaning as in section 17 (4)."*

[845]*Ibid.,* Sec.22 (1), (2). "22 *(Requirement for valid marriage) (1) Every marriage solemnized in Singapore shall be void unless it is solemnized – (a) on the authority of a valid marriage licence issued by the Registrar or a valid special marriage licence granted by the Minister; and (2) by the Registrar or a person who has been granted a licence to solemnize marriages. (2) Every marriage shall be solemnized in the presence of at least 2 credible witnesses.*"

[846]*Ibid.,* Sec.28. *"28. (Registration of marriage solemnized by Registrar) (1) Every marriage solemnized by the Registrar shall immediately after the solemnization thereof be registered by the Registrar in the certificate of marriage. (2) The entry of such marriage in the certificate of marriage shall – (a) be signed by the Registrar*

After the solemnization, the marriage shall be registered immediately by the registrar in a marriage certificate which will be signed by the Registrar, the respective couple and witnesses. On the completion of registration, the Registrar or the Deputy Registrar shall deliver to the bride a marriage certificate duly signed and sealed with his/her seal of office.[847]

A proper marriage registration is purely administrative exercise. The registration itself has no legal effect on the validity or otherwise of the marriage solemnized. The validity of a marriage depends on compliance with two sets of prescriptions, namely formalities of solemnization and capacity to marry one another. The Women's Charter mentions that no rule therein shall be construed to render a marriage is valid or invalid merely by reason of having been registered.[848]

1.7.4 Comparison with MA 1974

The women's Charter does not give any definition of marriage, yet it mentions the prescription of monogamous marriage recognized by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all other during the continuance of the marriage. MA 1974 defines that a marriage is a relationship between a man and a woman to establish a family. The difference between Singapore and Indonesia is the basis of marriage, as Indonesia relies marriages on religious value as reflected in the phrase *"... based on the Almighty God."*, while Singapore is silent.

The Women's Charter requires that the minimum age of 18 years old of a couple. It is the same as the requirement for a groom in MA 1974, but for a bride, MA 1974 requires lesser, namely 16 years old.

In relation to prohibition and parents' approval, the Women's Charter and MA 1974 stipulate similarly that they prohibit a couple who have a blood relationship and affinity to a particular extent from marrying. The Women's Charter and MA 1974 similarly require that parents' approval must be obtained for a groom or bride under 21 years old. The same case applies to the heterosexual requirements, in other words, Singapore and Indonesia, forbid a same-sex marriage. With regard to marriage solemnization, the Women's Charter requires registration; however, it is not the only requirement which

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solemnizing the marriage, and by the persons married; and (b) be attested by 2 credible witnesses, other than the Registrar solemnizing the marriage, present at the solemnization."

[847] *Ibid.,* Sec.31. *"31. (Copy of entry to be given) On the completion of the registration of any marriage, the Registrar or the Deputy Registrar shall deliver to the bride a copy of the certificate of marriage dully signed and sealed with his seal of office."*

[848] *Ibid.,* Sec.33. *"31. (Legal effect of registration) Nothing in this Act shall be construed to render valid or invalid merely by reason of its having been or not having been registered any marriage which otherwise is invalid or valid."* See also Leong Wai Kum, *Loc.Cit.,* p.16.

validates a marriage. MA 1974 requires that registration is a must, but it is not the only thing for marriage validation. Both require registration, yet it is not the requirement of validation.

1.8 Thailand

The marriage law in Thailand is stipulated in the Civil and Commercial Code of Thailand, in Book 5, Sec.1435-1535, hereinafter referred to as the "**Thailand's Civil Code**". It consists of the sections of betrothal or engagement, conditions for a marriage and husband and wife relation.

Marriages in Thailand are generally divided into two parts, legal marriage or civil marriage and ceremonial marriage, which are performed separately. The legal part is performed at a local district office where the marriage is registered as a civil marriage. There is no requirement from the State or no government document is required in the event that a couple wish to have a religious marriage ceremony.

1.8.1 Definition of Marriage

The Thailand's Civil Code does not provide any definition of marriage. However, the closest provision which describes a marriage can be found in Section 1461 of the Thailand's Civil Code. It is stated that a husband and wife cohabit as husband and wife and they must maintain and support each other according to his or her ability and condition in life.[849] In this provision, it can be seen that a marriage is an exclusive relationship between a man and woman, as a monogamous marriage, whereby they are bound each other to live together and cohabit as a husband and wife in any conditions in life.

[849] Thailand, the Civil and Commercial Code, Sec.1462. *"1461. Husband and wife shall cohabit as husband and wife. Husband and wife shall maintain and support each other according to his or her ability and condition in life."*

1.8.2 Capacity to Marry

1.8.2.1 The consent to marry of the parties to marriage

A marriage can only take place if a man and woman agree to take each other as husband and wife, and such agreement must be declared publicly before a Registrar in order to have it recorded by the Registrar.[850]

The Thailand's Civil Code does not provide any stipulation, if a couple's consent is given under suppression, fraud, force, intimidation or undue influence, as to whether a marriage may be annulled or cancelled as of the date of marriage.

1.8.2.2 Monogamy

A marriage cannot take place if a man or woman is bound to a marriage, or in other words, he or she is a spouse of another person.[851]

A woman, whose husband has passed away or whose marriage has been terminated legally, may re-marry provided that the subsequent marriage is not less than 310 days as of her marriage termination. An exception to the 310-day period is accepted in case that a child is born during such period, or the divorced couple re-marry, or there is a certificate by a qualified doctor who is a lawful physical practitioner in medicine certifying that the woman is not pregnant, or there is a Court order allowing the woman to marry.[852]

Based on the provisions above, a polygamous marriage and or polyandry marriage is forbidden in Thailand.

1.8.2.3 Minimal age

A marriage can only take place when a man and woman reach 17 years old. ACourt may allow them to marry before reaching such age in case they have an appropriate reason.[853]

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[850] *Ibid.*, Sec.1458. *"1458. A marriage can take place only if the man and woman agree to take each other as husband and wife, and such agreement must be declared publicly before the Registrar in order to have it recorded by the Registrar."*

[851] *Ibid.*, Sec.1452. *"1452. A marriage cannot take place if the man or woman is already the spouse of another person."*

[852] *Ibid.*, Sec.1453. *"In case of the woman whose husband died or whose marriage has become terminated, the marriage can only take place if not less than three hundred and ten days have elapsed since the termination of her previous marriage; unless (1) a child has been born during such period; (2) the divorced couple remarry; (3) there is a certificate issued by a qualified doctor who is a lawful physical practitioner in medicine showing that the man is not pregnant; (4) there is an order of the Court allowing the woman to marry."*

[853] *Ibid.*, Sec.1448. *"A marriage can take place only when the man and woman have completed their seventeenth year of age. But the Court, may, in case of having appropriate reason, allow them to marry before attaining such age."*

This age is different from a legal capacity or *sui juris* whereby a person is considered to have the legal capacity to act on behalf of himself or herself. The person shall be *suijuris* when he/she is 20 years old. A person under 20 years old can be considered as *sui juris* upon marriage.[854]

1.8.2.4 Parents' approval

If a groom or bride who is underage will conclude a marriage, his or her parents' consent is required, in case that his or her father and mother are still alive. A parent's consent is sufficient in case that his or her father or mother has passed away, or is in a condition of being unable to give such consent, or is under a circumstance that make the minor unable to ask for such consent. Consent from his or her adoptive parents is required if a groom or bride who is an adopted child. The consent may also originate from his or her guardian in case that there is no person authorized to give such consent, or such person waives his or her parental authority. A marriage concluded by a groom or bride who is underage without the said consent is voidable.[855]

The consent may be given by affixing a signature of the person giving the consent before a Registrar at the time of marriage registration, or by a statement which declares the consent and names of the parties to the marriage and is signed by the person giving the consent, or by verbal declaration before 2 witnesses. The consent above cannot be revoked.[856]

In the event that there is no person having the power to give the consent to marry, or if the person refuses to give the consent or is in a position unable to give the consent or the minor cannot, in such a circumstance, obtain the consent, the minor may file an application to a Court for giving the consent to marriage.[857]

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[854] *Ibid.,* Sec.19-20. *"19. A person, completion of twenty years of age ceases to be a minor and becomes* sui juris*."*

"20. A minor becomes sui juris upon marriage, provided that the marriage is made in accordance with the provisions of Section 1448."

[855] *Ibid.,* Sec.1454. *"1454. In case of marriage of a minor, the provisions of Section 1436 shall apply* mutatis mutandis*."*

[856] *Ibid.*, Sec.1455. *"1445. Giving consent to the marriage may be made: 1. By affixing signature of the person giving consent in the Register at the time of registration of the marriage; 2. By a consent document stating the names of the parties to the marriage and signed by the person giving consent; 3. By verbal declaration before at least two witnesses in case of necessity. The consent having been given cannot be revoked."*

[857] *Ibid.,* Sec.1456. *"1456. In case where there is no person having the power to give consent under Section 1454, or if the person refuses to give consent or is in the position of being unable to give consent, or the minor cannot, in such circumstances, as for the consent, the minor may file an application with the Court for giving consent to the marriage."*

1.8.2.5 Prohibition

A marriage cannot take place if either a man or woman is an insane person or adjudged as an incompetent person. A marriage cannot take place if a man and woman have a blood relation in the direct ascendant or descendant line, or brother or sister of full or half-blood relationship, either a legitimate or illegitimate relation. An adopter cannot marry his or her adopted child, including his or her adopted siblings and vice versa.[858]

1.8.2.6 Heterosexual Couple

Thailand's Civil Code still restricts a marriage to the union of a man and woman as stipulated clearly in the section which mentions the conditions for a marriage under Chapter II. It always states that a marriage can only take place if "the man and the woman" fulfill certain conditions. It can be found scattered in the respective section which reflects that a marriage in Thailand is for a heterosexual couple.

However, a same-sex couple are still able to marry in Thailand by way of a traditional ceremony and may live and reside together in their matrimonial home as a married couple in the eyes of (most of) society. However, such same-sex marriage is not recognized as a valid or legal marriage according to the Thailand's Civil Code.

1.8.3 Solemnization of Marriage

A marriage under the Thailand's Civil Code takes into effect only upon registration. A traditional or religious wedding ceremony can be performed but it has no legal impact on the respective marriage.[859]

1.8.4 Comparison with MA 1974

The Thailand's Civil Code does not give any definition of marriage. However, the closest provision in Section 1461 regarding relationship between a husband and wife is slightly the same as MA 1974. The Thailand's Civil Code mentions that it is a relation of a husband and wife exclusively between them, who cohabit as a husband and wife and they shall maintain and support each other according to their ability and condition in life. MA 1974 defines almost the same that marriage is a relation between a man and woman to establish a happy family or household whereby both must help and love each other. The difference between both provisions, is the basic value of marriage, whereby

[858] *Ibid.*, Sec.1449-1451. *"1449. A marriage cannot take place if either the man or the woman is an insane person or adjudged incompetent.*
1450. An adopter cannot marry the adopted.
1451. A marriage cannot take place if the man or woman is already the spouse of another person."

[859] *Ibid.*, Sec.1457. *"1457. Marriage under this Code shall be effected only on registration being made."*

the Thailand's Civil Code does not mention about any religious value, while MA 1974 relies on religion value as reflected in the phrase *"... based on the Almighty God."*

The Thailand's Civil Code requires an absolute monogamy, while MA 1974 allows a polygamous marriage which requires a prior approval from a district court which is only given upon certain requirements according to MA 1974.

In relation to minimum age, the Thailand's Civil Code requires the age of 17 years old both for a groom and bride. MA 1974 requires that a groom must be older, namely 18 years old, and a bride must be 16 years old.

In relation to parents' approval, the Thailand's Civil Code and MA 1974 similarly require that a couple must obtain parents' approval if a groom or bride is underage. However, the Thailand's Civil Code mentions 20 years old as the limitation, while MA 1974 mentions 21 years old as the limitation. When a groom or bride cannot have parents' approval for an unreasonable reason, it can be replaced by a court decision.

In relation to heterosexual requirement and solemnization, the Thailand's Civil Code and MA 1974 require the same. Both forbid a same-sex marriage.

Marriage registration in a Family Registrar Office is the validation of marriage according to the Thailand's Civil Code. Traditional wedding ceremony can be performed but it has no legal impact on the respective marriage. MA 1974 requires the registration, but it is not the only thing for marriage validation.

1.9 Vietnam

On June 19, 2014, the Vietnamese National Assembly passed Law on Marriage and Family No.52/2014/QH13 (herein referred to as the "**Vietnamese Marriage Law 2014**"). This law came into effect on January 1, 2015 and replaced the previous Marriage Law No.22/2000/QH10 of 2000. The Vietnamese Marriage Law 2014 has 9 chapters and 133 articles, which includes general provisions, marriage and its solemnization, husband and wife relation, marriage termination, relation between parents and children, as well as relation among family members, supports, marriage and family relations involving foreign elements, and implementation provisions.

The Vietnamese Marriage Law 2014 has many significant changes. This act provides new provisions that enable a couple to have a child through an arrangement of altruistic

surrogacy. It also raises the minimum age of bride and groom and provides a marital agreement between a husband and wife with regard to their matrimonial properties.[860]

The Vietnamese Marriage Law 2014 stipulates "surrogacy for humanitarian purpose" in Art.93-100 of the Vietnamese Marriage Law 2014. It allows surrogacy as long as it meets the statutory conditions, such as the surrogacy must be performed on a voluntary basis by the parties. The agreement between the parties must be in writing, further it must be certified by competent medical entities on the inability to give birth of the mothers even when applying supporting measures. The woman who helps in surrogacy must have a blood relationship with either the husband or wife. The surrogacy can only be performed once in her life-time.[861]These tight requirements are made in order to avoid any commercial surrogacy. However, this law opens up the chance for a couple who are incapable of giving birth and opportunity to have parenthood experience as well as demonstrates a respectful view towards sacred rights of a human.

The Vietnamese Marriage Law 2014 is applied to a marriage between Vietnamese citizens of different nationalities or religions, between religious and non-religious people, between people with a belief and people without any belief, and between Vietnamese citizens and foreigners shall be respected and protected.[862] In relation to the

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[860] Vietnam, the Marriage Law, Law No.52/2014/QH13 dated June 19, 2014, Art.47-49. *47 (Agreement on establishment of the matrimonial property regime) For a married couple that selects the agreed property regime, this agreement shall be made in writing before their marriage and be notarized or certified. The agreement matrimonial property regime shall be established on the date of marriage registration. 48 (Basic contents of an agreement on the matrimonial property regime) 1. The basic content of an agreement on the property regime include: a. property determined as common property and separate property of the husband and wife; b. Rights and obligations of the husband and wife toward common property, separate property and related transactions; property to meet the family's essential needs; c. Conditions, procedures and principles of property division upon termination of the property regime; d. others related contents. 2. For matters arising in the implementation of the agreed property regime which have not been agreed or unclearly agreed by husband and wife, Articles 29, 30, 31, and 32 of this Law and corresponding provisions of the statutory property regime shall apply. 49. (Modification of the agreement on the matrimonial property regime) 1. Husband and wife have the right to modify their agreement on the property regime. 2. The form of modification of the agreement on the property regime must comply with Article 47 of this Law."*

[861] *Ibid.,* Art.95 (1). *"95. (Conditions for altruistic gestational surrogacy) (1) Altruistic gestational surrogacy shall be based on the voluntariness of involved parties and established in writing. (2) Husband and wife have the right to ask for a person's gestational surrogacy when they fully meet the following conditions: a. The wife is certified by a competent health organization as unable to carry a pregnancy and give birth even with assisted reproductive technology; b. the couple has no common child; c. the couple has received health, legal and psychology counselling. (3) A gestational carrier must fully satisfy the following conditions: a. she is a next of kin of the same line of the wife or husband who asks for gestational surrogacy; b. she has given birth and permitted for gestational surrogacy only one; c. she is at a suitable age and is certified by a competent health organization as eligible for gestational surrogacy; d. in case she is married, she obtains her husband's written consent; dd. She has received health, legal and psychological counselling. (4) Altruistic gestational surrogacy must not contravene the law on giving birth with assisted reproductive technology. (5) The Government shall detail this Article."*

[862] *Ibid.,* Art.2 (2). *"2. (Fundamental principles of the marriage and family regime) … (2) Marriage between Vietnamese citizens of different nationalities or religions, between religious and non-religious people, between people with beliefs and people without beliefs, and between Vietnamese citizens and foreigners shall be respected and protected by law."*

belief, it stipulates that a husband and wife have the obligation to respect each other's right to freedom of belief and wife.[863]

The Vietnamese Marriage Law 2014 repeals the ban on marriages between same gender sexes in order to avoid discrimination. Basically, marriage is a combination of two different genders as stated that the State shall not recognize any marriage between persons of same sex.[864]

1.9.1 Definition of Marriage

The Vietnamese Marriage Law 2014 stipulates that marriage is a relation between a husband and wife after they get married.[865] It also stipulates that the definition of "getting married" as an establishment relationship of a man and woman as husband and wife according to provisions of the prevailing law on marriage conditions and registration, while "cohabitation as husband and wife" as the organization of a man and a woman to live together and consider themselves as the husband and wife.[866] This definition accentuates the relation between a husband and wife after marriage solemnization and during marriage, instead of having descendants.

1.9.2 Capacity to Marry

The Vietnamese Marriage Law 2014 stipulates marriage requirements under Chapter II Article 8 up to Article 16. A legal marriage sets up a legal relationship between a husband and wife, parents and children, also the matrimonial regime. The conditions for a marriage are stipulated in Article 8 of the Vietnamese Marriage Law 2014, as will be discussed below.

1.9.2.1 Consent of the parties to a marriage

A voluntary marriage is one of the fundamental principles of marriage in the Vietnamese Marriage Law 2014.[867]This principle is reflected in the requirement stating that a

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[863] *Ibid.,* Art.22. *"Husband and wife have the obligation to respect each other's right to freedom of belief and religion."*

[864] *Ibid.*, Art.8. *"8. (Conditions for getting married) (1) A man and a woman wishing to marry each other must satisfy the following conditions: (a) the man is full 20 years or older, the woman is full 18 years or older; (b) the marriage is voluntary decided by the man and the woman; (c) the man and woman do not lose the civil act capacity; (d) the marriage does not fall into the cases prescribed at Point (a), (b), (c) and (d), Clause 2 Article 5 of this Law. (2) The State shall not recognize marriage between persons of the same sex."*

[865] *Ibid.,* Art.3. *"3. (Interpretation of terms) … (1)* Marriage *means the relation between husband and wife after they get married. …"*

[866] *Ibid.,* Art.3 point (5) and (7). "3. (Interpretation of terms) … (3) Getting married means a man and a woman's establishment of the husband and wife relation according to the provisions of this Law on marriage conditions and registration. … (7) Cohabitation as husband and wife means a man and a woman's organization of their living together and consideration of themselves as husband and wife. …"

[867] *Ibid.,* Art.2 (1). "2. (Fundamental principles of the marriage and family regime) (1) Voluntary, progressive and monogamous marriage in which husband and wife are equal. …"

marriage must be voluntarily decided by a man and woman.[868] Traditionally, a marriage can be arranged by parents of the couple; however, by this requirement, a free and voluntary consent of the couple-to-be at the end remains as the ultimate requisite.

This voluntary consent must be free from any suppression by any third parties or coercion. The Vietnamese Marriage Law 2014 prohibits any action forcing or deceiving a person into marriage, or even obstructing a marriage.[869]

A person who is forced or deceived into a marriage has the right to request by himself or herself the annulment of his/her illegal marriage by a court. He or she can be represented by his or her parent(s), child, guardian or another person who is acting as attorney-at-law to represent him or her who marries illegally. The state management agency in charge of families or state management agency in charge of children or women's union can also represent him or her to request the annulment of marriage if they detect an illegal marriage.[870]

A forced marriage in this term means threatening, intimidating spiritually, maltreating, ill-treating, demanding properties or other actions forcing a person to get married against his or her will. Obstructing a marriage has slightly the same definition, namely threatening, intimidating spiritually, maltreating, ill-treating, demanding properties or other actions forcing a person eligible to get married under this Law or forcing a person

[868] *Ibid.,* Art.8 (1) point (b). "8. (Conditions for getting married) (1) A man and a woman wishing to marry each other must satisfy the following conditions: … (b) the marriage is voluntary decided by the man and the woman; …"

[869] *Ibid.,* Art.5 (2) point (b). "5. (Protection of the marriage and family regime) … (2) The following acts are prohibited: … (b) …. forcing a person into marriage, deceiving a person into marriage, obstructing marriage; …"

[870] *Ibid.,* Art.10. "10 (Persons having the right to request annulment of illegal marriage) (1) A person who is forced or deceived into a marriage has, as prescribed by the civil procedure law, the right to request by himself/herself, or propose a person or an organization prescribed in Clause 2 of this Article to request, a court to annul his/her illegal marriage due to violation of Point b, Clause 1, Article 8 of this Law. (2) The following persons, agencies and organization have, as prescribed by the civil procedure law, the right to request a court to annul an illegal marriage due to violation of Point (a), (c) or (d), Clause 1, Article 8 of this Law: (a) the spouse of a married person who gets married to another person; parent, child, guardian or another at-law representative of a person who gets married illegally; (b) the state management agency in charge of families; (c) the state management agency in charge of children; (d) the woman's union. (3) When detecting an illegal marriage, other persons, agencies or organization have the right to propose an agency or organization prescribed at Point (b), (c), or (d) Clause 2 of this Article to request a court to annul such marriage."

to maintain a marriage relation against his or her will.[871] When an illegal marriage is annulled, the parties to such marriage shall stop their relationship as husband and wife.[872]

Even though a marriage has the parties' consent, if the marriage is found as "sham marriage", such marriage is invalid. A sham marriage is known as the use of marriage for the purpose of immigration, residence or naturalization in Vietnam or others, instead of building a family.[873]

1.9.2.2 Monogamy

A monogamous marriage is one of the fundamental principles of marriage and family regime.[874] This requirement is one of the marriage conditions, as stipulated in Article 8 of the Vietnamese Marriage Law 2014.

This principle is also reflected in one of the marriage prohibitions which prohibits a married person from getting married to or cohabiting as husband and wife with another person or an unmarried person from getting married to or cohabiting as husband and wife with a married person.[875]

There is no prohibition in the Vietnamese Marriage Law 2014 whether a divorced man or woman can re-marry another person who is eligible to marry according to the law, or any other divorced spouse. The Vietnamese Marriage Law 2014 also does not stipulate whether a woman has to wait a certain period or confirm that she is not pregnant from her former husband after divorce. It only states that a divorced couple who wish to re-establish their marriage or re-marry to restore their husband and wife relation must register their re-marriage.[876] From the above monogamy and re-marry requirement, it

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[871] *Ibid.,* Art.3 point (9). "3. (Interpretation of terms) … (9) Forcing marriage or divorce means threatening, intimidating spiritually, maltreating, ill-treating, demanding property or another act to force a person to get married or to divorce against his or her will. (10) Obstructing marriage or divorce means threating, intimidating spiritually, maltreating, ill-treating, demanding property or another act to obstruct the marriage of a person eligible to get married under this Law or to force a person to maintain the marriage relation against his/her will."

[872] *Ibid.,* Art.12 (1). "12. (Legal consequences of the annulment of illegal marriage) (1) When an illegal marriage is annulled, the two partners of such marriage shall stop their husband and wife relation."

[873] *Ibid.,* Art.3 point (11). "3. (Interpretation of terms) … (11) Sham marriage means making use of a marriage for the purpose of immigration, residence or naturalization in Vietnam or a foreign country; for enjoying preferential regimes of the State or for another purpose other than that of building a family."

[874] *Ibid.,* Art.2 (1). Please see footnote above.

[875] *Ibid.,* Art.5 (2) point (c). *"Article 5 (Protection of the marriage and family regime) … (2) The following acts are prohibited: (a) sham marriage or sham divorce; … (c) a married person getting married to or cohabitating as husband and wife with another person, or unmarried person getting married to or cohabitating as husband and wife with a married person; …"*

[876] *Ibid.,* Art.9 (2). *"9. (Marriage registration) … (2) A divorced couple who wish to re-establish their husband and wife relation shall register their re-marriage."*

can be concluded that the Vietnamese Marriage Law 2014 facilitates and supports a divorced couple to re-marry his or her previous spouse.

1.9.2.3 Minimum age

The Vietnamese Marriage Law 2014stipulates that a groom must be 20 years old and a bride must be 18 years old, one year older than the previous marriage law. In addition to this requirement, this new law prohibits any child marriage or "underage marriage",[877] which is defined as a marriage between a couple who one or both of them has or have not reached 20 years old for the man or 18 years old for the woman as the minimum age for marriage as stipulated in Article 8 of the Vietnamese Marriage Law 2014.

In addition to the requirement of minimum age for a marriage, a man and woman must also fulfill the requirement that they have a legal capacity to take any civil action.[878]

1.9.2.4 Parents' approval

The Vietnamese Marriage Law 2014 is silent on this requirement. It appears that parents' approval is not one of the requirements for a couple to marry.

1.9.2.5 Prohibition

The Vietnamese Marriage Law 2014 prohibits some actions in relation to a marriage, as mentioned above, among others a sham marriage; underage marriage, forcing a person into marriage or obstructing a marriage, domestic violence, etc.

In relation to prohibitions between a couple-to-be, it provides the prohibition of marriage or cohabiting as husband and wife between people of the same direct blood line; relatives within three generations; adoptive parent and adopted child; or former adoptive parent and adopted child, father-in-law and daughter-in-law, mother-in-law and son-in-law, or step-parent and step-child.[879]

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[877] *Ibid.,* Art.5 (2) point (b). *"Article 5 (Protection of the marriage and family regime) … (2) The following acts are prohibited: … (b) underage marriage, forcing a person into marriage, deceiving a person into marriage, obstructing marriage; …"*

[878] *Ibid.,* Art.8 (1) point (a) and (c). *"8. (Conditions for getting married) (1) A man and a woman wishing to marry each other must satisfy the following conditions: (a) the man is full 20 years or older, the woman is full 18 years or older; … (c) The man and woman do not lose the civil act capacity; …"*

[879] *Ibid.,* Art.5 (2) point (d). *"Article 5 (Protection of the marriage and family regime) … (2) The following acts are prohibited: (a) sham marriage or sham divorce; (b) underage marriage, forcing a person into marriage, deceiving a person into marriage, obstructing marriage; (c) a married person getting married to or cohabitating as husband and wife with another person, or unmarried person getting married to or cohabitating as husband and wife with a married person; (d) getting married or cohabitating as husband and wife between people of the same direct blood line; relatives within three generations; adoptive parent and adopted child; or former adoptive parent and adopted child, father-in-law and daughter-in-law, mother-in-law and son-in-law, or stepparent and stepchild; (dd) demanding property in marriage; (e) forcing a person into divorce; deceiving a person into divorce obstructing divorce; (g) giving birth with assisted reproductive technology for commercial purpose, commercial*

In relation to the prohibition above, the Vietnamese Marriage Law 2014 defines that "people of the same direct blood" are those in the consanguineal relationship in which a person gives birth to another in a successive order. The "relatives within three generations" means people born on the same stock with parents constituting the first generation; full siblings, parental half siblings and maternal half siblings constituting the second generation; and children of parental aunts, maternal aunts, paternal uncles, maternal uncles constituting the third generation.[880]

1.9.2.6 Heterosexual Marriage

The Vietnamese Marriage Law 2014generally provides for a heterosexual marriage. It provides that that the government of Vietnam shall not recognize a marriage between persons of same sex.[881]This law continues the previous legislation's ban on same-sex marriage, and the text does not extend legal protection to individuals in such marriage in case of conflicts between spouses.

On the other hand, this provision is recognized as permission from the State to a couple who wish to have a same-sex "marriage". The State does not prohibit nor punish or criminalize such action, yet the State will not recognize such cohabitation or union as a legal and valid marriage.[882]

1.9.3 Solemnization of Marriage

The Vietnamese Marriage Law 2014 requires registration at a competent state agency for a valid marriage. An unregistered marriage shall be considered as invalid. The same stipulation is also applied to a couple who also have the intention to re-establish their marriage after divorce. They have to register their re-marriage.[883]

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gestational surrogacy, prenatal sex selection, cloning; (h) domestic violence; (i) taking advantage of marriage and family rights for human trafficking, labor exploitation or sexual abuse or committing another act for self-seeking purposes."

[880]*Ibid.,* Art.3 point (17) and (18). "3. (Interpretation of terms) … *(17)*People of the same direct blood *are those in the consanguineous relationship in which a person gives birth to another in a successive order.* (18) Relatives within three generations *means people born on the same stock with parents constituting the first generation; full siblings, parental half siblings and maternal half siblings constituting the second generation; and children of parental aunts, maternal aunts, paternal uncles, maternal uncles constituting the third generation."*

[881]*Ibid.,* Art.8 (2). *"(8) (Conditions for getting married) … (2) The State shall not recognize marriage between person of the same sex."*

[882] See *New Law on Marriage and Family*, on *Vietnam Law and Legal Forum* updated on August 5, 2015, available at http://vietnamlawmagazine.vn/new-law-on-marriage-and-family-4067.html, accessed on November 8, 2016.

[883]*Ibid.,* Art.9. *"9 (Marriage registration) (1) A marriage shall be registered with a competent state agency in accordance with this Law and the law on civil status. A Marriage which is not registered under this Clause is legally invalid. (2) A divorce couple who wish to re-establish their husband and wife relation shall register their re-marriage."*

If a couple who are eligible to marry under the Vietnamese Marriage Law cohabits as husband and wife without any registration, each of them has no right and obligation as husband and wife. Rights and obligations towards their children, properties, obligation and contract shall be settled according to the partners' agreement or according to the Civil Code or another relevant law if they do not have any partners' agreement.[884]

1.9.4 Comparison with MA 1974

The Vietnamese Marriage Law 2014 stipulates that marriage is a relation between a husband and wife after they get married. A legal marriage incurs a legal relationship between the husband and wife, relation between parents and children, in addition to the matrimonial regime. Family members have the obligation to respect, care for and assist one another, treat children without any discrimination to build a happy family.

It is almost the same as MA 1974 which defines marriage as a relationship between a man and a woman to establish a happy family. Even though it is not stated in the definition, a marriage in Indonesia has a legal relationship between a husband and wife, relation between parents and children, and the matrimonial regime. The difference is the religion value which serves as the basis for a marriage, as reflected in the phrase *"... based on the Almighty God."*

The Vietnamese Marriage Law 2014 and MA 1974 require consent from the couple to get married. The Vietnamese Marriage Law 2014 requires an absolute monogamy, while MA 1974 allows a polygamous marriage with certain requirements. In relation to minimum age, the Vietnamese Marriage Law 2014 requires the age of 20 years old for a groom and 18 years old for a bride. MA 1974 requires a lower minimum age, namely 18 years old for a groom and 16 years old for a bride. However, they have to have their parents' approval if they are under 21 years old, while the Vietnamese Marriage Law 2014 is silent on parent's approval.

The Vietnamese Marriage Law 2014 and MA 1974 require similarly that a marriage must be between a heterosexual couple. A same-sex marriage is forbidden.

The Vietnamese Marriage Law 2014 requires a monogamous marriage. The monogamous marriage requirement is absolute, since there is no provision as to whether or not a divorced spouse can or are eligible to marry another person. It only stipulates a

[884] *Ibid.*, Art.14. *"14. (Settlement of consequences of men and women cohabiting as husband and wife without marriage registration) (1) A man and woman eligible for getting married under this Law who cohabit as husband and wife without registering their marriage between husband and wife. Rights and obligations toward their children, property, obligations and contracts between the partners must comply with 15 and 16 of this Law. (2) For a man and woman who cohabit as husband and wife under Clause 1 of this Article and later register their marriage in accordance with law, their marriage relation shall be established from the time of marriage registration."*

re-marriage between a divorced spouse who wish to re-establish or restore their relationship as husband and wife again. MA 1974 allows a polygamous marriage provided that approval from a district court which is only granted upon certain conditions is obtained.

The Vietnamese Marriage Law 2014 requires registration at a competent state agency for a valid marriage. An unregistered marriage shall be considered as illegal marriage that causes the couple have no right and obligation as husband and wife. MA 1974 also requires that every marriage must be registered, but it is not the only point of marriage validation.

2 Comparison of marriage requirements in the ASEAN Member States

This summary consists of two major parts. The first part is the summary of comparison of marriage requirements in the ASEAN Member States. The second part contain particular issues relevant to a marriage, for instance, the issue of same-sex marriage, persons with Disorder of Sexual Development, and form of marriage: Civil Marriage orReligious Marriage.

2.1 Similarities and Differences

Comparison between the ASEAN Member States with regard to marriage requirements and marriage solemnization confirms some similarities and differences. The primary conclusion is about the concept of marriage within the ASEAN Member States. The question: “what is a marriage?” becomes one of the important discussions in order to have a conclusion whether or not unification or harmonization can be accomplished.

Those member states have similar requirements of consent of the couple to enter into a marriage, approval from parents or guardian of the couple, marriage prohibitions and heterosexual couple requirement. Although they are mainly similar, the author finds no identical provision. Differences are shown in the requirements of monogamous principle and minimum age for a marriage. Those items shall be described below.

2.1.1 Concept of marriage

2.1.1.1 Elements of marriage

From the description above, it is obvious that legal regulations on marriage vary from one another. Differences include the condition and manner of marriage solemnization as well as effects of marriage, including the possibility of and prerequisites for dissolution, etc. Such differences are significant, and establishing a common denominator of all unions as a marriage is possible, but not an easy task.

It is important to scrutinize the concept of marriage in regulations of the ASEAN Member States in order, at least, to identify what a marriage is. One of the purposes is for ease of recognition. In practice, courts face the question of marriage validity. This requires judges, according to their law, to observe in its regulation or define what a marriage is and then, assess whether a relationship between a man and woman can be considered as a marriage. Based on such definition, judges decide whether or not the union of the couple is a marriage, or maybe not more than a concubine or casual partnership. This form of union, then, shall give legal impacts, for instance, whether or not the couple is a legal heir of the other, or legal status of children, or assets under occupation of the couple.

In fact, a marriage is distinguished from other unions between persons of different sex, and based on such fact, it has stronger legal effects within the community in question than other unions in the same community. The relation between the people involved is exclusive and therefore, they have a particular relation to each other and their descendants as consequences of their union.[885]

A marriage has, at least, three elements namely union of persons with different sex, life-time requirement, and exclusion of all others. The definition brings out important elements which become the requirements for a marriage. First, the union must be between people who are of different sex. The union is exclusive between those two persons, bringing out the principle of monogamy or at least, a very strict polygamous marriage. The union also requires life-long cohabitation, no divorce or at least, no easy dissolution. Unions other than that shall not be regarded as a marriage.

Each ASEAN Member State has its own way to describe the definition, meaning or purpose of marriage in its laws and regulations. Brunei, Cambodia, Indonesia, the Philippines, and Vietnam mention its definition clearly, directly and explicitly in one of the provisions. Some ASEAN Member States mention the important elements, purposes of marriage or a provision which has the closest definition of marriage, for instance, Lao PDR, Malaysia, Myanmar, Singapore, Thailand and Vietnam.

Brunei defines marriage as a voluntary union for life or until the marriage is dissolved by a court of competent jurisdiction of one man with one woman to the exclusion of all others. Cambodia defines it as a solemn contract whereby one man and one woman establish a union that is sanctioned by law and may not be broken only at their wish. Indonesia mentions that a marriage is a physical and spiritual relationship between a man and woman as husband and wife in order to create an eternal happy family based on the Almighty God. The Philippines mentions that a marriage is a special contract of

[885] Lennart Palsson, Op.Cit., p.146.

permanent union between a man and woman entered into in accordance with the law for the establishment of conjugal and family life.

Other states mention the aims, principles or requirements to describe a marriage in their prevailing regulations. Lao PDR mentions the aim of the family law, among others, to establish a matrimonial and family relationship based on a mutual consent and equality between a man and woman, to educate children, to live the family and to protect the interest of woman and children in family life and upon divorce. Malaysia has important elements in its marriage provisions; it has the voluntary union, between a man and woman, to the exclusion of all others, for their life-time period. Based on writing, Myanmar mentions that one of the important elements in a marriage is consent of the parties to enter into a marriage. Singapore mentions that a monogamous marriage is a marriage recognized by the law of the place where it is contracted, as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage. Thailand requires a marriage as a voluntary consent between a man and woman who cohabit as husband and wife and maintain and support each other according to their ability and condition of life. Vietnam mentions in its regulation that a marriage is a voluntary consent between a man and woman who then cohabit as husband and wife according to the prevailing regulations.

Having considered the definitions and or purposes of marriage of the ASEAN Member States, there are some similarities. The main idea of marriage, mentioned by every ASEAN Member State, is voluntary consent of a man and woman to be united in an exclusive relationship only between them. Another element is a couple, a man and woman, who cohabit as husband and wife.

Consent between the couple becomes the ultimate element in a marriage. A marriage is based on consent which must be given voluntarily by the parties. This consent to enter into a marriage drives the couple into a particular relationship only between them or initiates an exclusive relationship between a man and woman who both agree or give consent to live together and cohabit as husband and wife. The exclusiveness of relation between the couple reflects a monogamous marriage, or at least, it is limited in some particular situations.

Cohabitation becomes one of the elements which also appear in the definition. When a couple voluntarily consents to each other, they sign up for cohabitation as husband and wife. The couple must live together, love and support each other as a family. If they agree to live together without any cohabitation as husband and wife, the union cannot be referred to as marriage.

Another element is the period of time, *for life* –or at least it is expected to be a lifetime. The purpose of cohabitation for a life time makes a couple give consent without any

assumption that it is only for certain years. This element disqualifies a contract marriage as legal or valid marriage. This element also overrides any dissolution of marriage only based on mutual consent of the parties. Save for the Philippines which prohibits divorce, any dissolution must be based on a district court decision upon a very distinct reason.[886]

2.1.1.2 Marriage system

A marriage must usually be solemnized by or before an authority, either civil or religious. The most significant difference is found in the opposition between civil and religious forms of marriage. Based on these manners, there are three main systems of marriage.[887]

The first system is the compulsory civil form of marriage. The second system usually appears by a close connection between the State and an established religion, so a religious solemnization of marriage is compulsory. The third system is optional civil or religious form of marriage.

The other system is the informal marriage. Being different from all systems mentioned above, some laws allow a marriage to come into being by a sole agreement of the parties (*solo consensus*) or otherwise without requiring any formal act of solemnization. It is permitted to enter into a marriage by informal act of the parties declaring to take each other there and then as husband and wife. Another example is given by the Islamic law, where a marriage is, in principle, constituted by a mere exchange of consent of the parties, or *de facto* marriage constituted by actual cohabitation of the parties, or "by habit and repute".

In relation to these forms, it can be said that most ASEAN Member States legal pluralism in their legal system apply the first two systems or even, every form of marriage. Based on the description of marriage in the preceding discussion (see sub-chapter 5.1), the author only takes the national regulation or a regulation which covers the majority of residents in the respective state.

As far as system is concerned, most ASEAN Member States apply, at least, two systems. Brunei applies the religious system for its Moslem residents and the civil system for its non-Moslem residents. It is also the same for Malaysia.

Cambodia, Lao PDR, the Philippines, Singapore, Thailand and Vietnam adopt the first system, namely civil marriage. A union between a man and woman must be registered in the civil registration, without any requirement that solemnization must be according to a religious or holy matrimonial ceremony. The author argues that Indonesia takes all

[886] The details will be discussed in sub-chapter 3.2.1.4.1. below.
[887] Lennart Palssön, *Op.Cit.,* pp.169, 174-237.

of the three-systems, as an informal marriage can be found in indigenous people who still apply their *Adat* Law. Myanmar adopts both the religious marriage system and informal marriage system at the same time.

Although the description above shows the variety of marriage systems within the ASEAN Member States, it also shows one similarity. All ASEAN Member States define a marriage as the union of a man and woman in an exclusive relationship which is hopefully for a life-long period. In addition to such union, structured, order and systematic registration is made on all marriages within the territory and also abroad, as relevant.

2.1.2 Similarities

2.1.2.1 Consent of the parties to a marriage

Each ASEAN Member State requires that a couple must give their consent to enter into a marriage, free from any fraud, suppression or intimidation or any kind of such action.

In the culture of the ASEAN Member States, it is common that a marriage is arranged by parents when the couple are very young. Although, it is an arranged or planned marriage, in the end, the couple must give their consent to enter into the marriage. A marriage will not happen if consent from each of the couple is not given. Consent from a bride can be a nod or even silence, as long as no gesture of the bride indicates refusal of the proposal. Such nod or silence is considered common as women in the ASEAN Member States are more passive and tends not to show their feelings expressively.

Registration officers are entitled to procrastinate a marriage or even forbid the solemnization of such marriage if they are not satisfied or confident that the couple give their consent to enter into the marriage. If they do solemnize the marriage without any consent from the respective parties, they can be subject to a fine or sentence. Further, the marriage can be cancelled.

Registrar officers are required to confirm the existence of this consent. If the officers are in doubt or are not satisfied that the couple-to-be agree to enter into the marriage, they are entitled to suspend or postpone the solemnization of marriage. If they continue the solemnization, they can be imprisoned and or fined.

In the majority of the ASEAN Member States, non-existence of the consent can cause the annulment of marriage from the date of marriage. Any exception can only be made if those parties afterward with full awareness of the fact of fraud, intimidation or undue influence after it disappears, they remain freely cohabit with their counterpart as husband and wife.

Thailand is silent to the extent what if the consent given by the couples is illegal or invalid due to any suppression, fraud, or intimidation. However, the author believes that the existing provisions already cover such prohibition, because the bride or groom must declare its consent publicly before the Registrar.

2.1.2.2 Parents' approval

A couples are obligated to obtain their parent's approval to enter into a marriage, if they are under a certain age, except in Vietnam. A bride or groom under the age of twenty or twenty one years old is usually obligate to do so. Parents' approval can be replaced by approval from their guardian or *wali* as party who holds parents' authority. If approval is not given by the parents for an unreasonable reason, the couple can request the approval from a judge which will be considered the same as parents' approval.

In countries which have an immense influence of Islam, parents' approval is required without any relation to the minimum age, specifically for a bride. In these conditions, parents' approval becomes a substantive requirement for a marriage. On the other hand, parents' approval in Singapore is considered as formality requirement.

2.1.2.3 Prohibition

Prohibition also exists in each ASEAN Member State, although its degree varies. A couples who have a very close blood relationship, affinity, either descendant or descendant, are prohibited from marrying. This prohibition also covers adoptive relation or family relation by marriage.

Indonesia, Malaysia and Brunei stipulate that a family of *persusuan* is prohibited from marrying each other. This prohibition exists in three states having a prominent Moslem influence. Generally, a family of *persusuan* is family ties between babies or children raised by breastfeeding from the same woman who is not their biological mother. The Brunei Islamic Family Law defines the family of *persusuan* as a child below two years old according to the Islamic calendar (*qamariyah*), who is satisfied by breastfeeding on at least five occasions by a woman who is not his or her biological mother.[888] Indonesia and Malaysia have no particular definition of such family ties, yet it is understood as the same even though there is no provision on how many occasions the breastfeeding occurs.

[888]See Art.2 regarding the Interpretation of Brunei Islamic Family Law. *"*sesusuan *means where a child, below the age of 2 years according to the Islamic calendar (*qamariyah*), is satisfied by breast feeding on at least 5 occasions by a woman that is not his natural mother;"*

2.1.2.4 Heterosexual couple

This requirement is maintained by the ASEAN Member States. A couple must be between a man and woman. A same-sex marriage is prohibited, including domestic partnership or civil union.

In the requirement, only Singapore gives a more in-depth stipulation for determining who are "women" or "men". The sexual identity of a person is recognized based on the legal identity issued by the prevailing regulation. Women include persons who have undergone a reconstruction surgery to become women. Vice versa, men also include persons who have undergone a reconstruction surgery to become men. The latest condition shall be considered as the latest condition of each person noted in his or her latest legal identity card. A person must marry an opposite sex.

2.1.3 Differences

2.1.3.1 Aim of Marriage

The concept stating that a family is the basic unit of the society frames the protection of family. One of the backgrounds of the protection is building a strong society which begins from the family.

Having reviewed the definition of marriage (sub-chapter 5.2.1.1), Brunei, Cambodia, Malaysia, Singapore, Thailand and Vietnam mention that a marriage is a voluntary union for life between a man and woman to the exclusion of all others. The aim or main element is relationship between the couple. This purpose instigates obligations between a husband and wife to love, support each other as long as they are married, regardless whether or not such laws and regulations have religious values.

The Philippines states that a marriage is a special contract of permanent union between a man and woman entered into in accordance with the law for the establishment of conjugal and family life. Almost similar to it, Indonesia mentions that marriage is a physical and spiritual relationship between a man and a woman as husband and wife in order to create an eternal happy family based on the Almighty God. Both mention that marriage establishes a family, yet Indonesia has a religious aspect.

Other states mention the aims, principles or requirements to describe about a marriage in their prevailing regulations. Lao PDR mentions the aim of the family law, among others, to establish a matrimonial and family relationship based on a mutual consent and equality between a man and woman, to educate children, to live the family and to protect the interest of woman and children in family life and upon divorce.

2.1.3.2 Monogamous Principle

This requirement exists in each ASEAN Member State. In Cambodia, Lao PDR, Myanmar, the Philippines, Thailand and Vietnam, this requirement is absolute. In Indonesia, Malaysia, and Brunei, a monogamous marriage is prioritized, only in certain cases and grounds; a husband can marry another woman or perform a polygamous marriage.

The religious background of countries and purpose of marriage influence this requirement. When a marriage has the objective to have a descendant, a polygamous marriage is allowed. There are two main views of this requirement, namely absolute monogamous marriage and limited polygamous marriage.

2.1.3.2.1 Absolute monogamy requirement

In some countries that have a strong influence of Christian or Catholic and Buddha, such as Cambodia, Lao PDR, Myanmar, the Philippines, Thailand and Vietnam, a marriage must be monogamous. In the Philippines, this requirement is absolute, any divorce is prohibited.

In Cambodia, Lao PDR, Myanmar, Thailand and Vietnam, monogamy is one of the requirements. Divorce and re-marry are possible and allowed, but a monogamous marriage remains a must. Therefore, a person must be legally single when he or she enters into a marriage. Re-marry is allowed, provided that the person has legal evidence of his or her divorce. If he or she is in the process of divorce, he or she must wait until all processes are legally finished.

For a woman, after divorce, she must wait for a certain period to be able to re-marry. This period is acceptable to ascertain that she is not pregnant or bears a baby from her previous husband, in order to avoid any confusion of descendant and to protect the paternal right. In Cambodia, this requirement can be avoided if the woman is able to show a statement that she is not pregnant from any competent professionals, for instance, a medical doctor.

2.1.3.2.2 Limited Polygamous Marriage

This requirement could be found in Brunei, Indonesia and Malaysia. A monogamous marriage is a prioritized marriage, yet in a certain case approved by a judge, a husband may enter into his second marriage or more with another woman.

In Indonesia, a husband is allowed to marry again if his wife cannot bear any child, or is in a condition of incurred sickness. However, he must have a prior approval from a judge, who will ask the consent of the existing wife or wives as to whether or not she or

they agree(s) to be a co-wife. In addition, the husband must also prove to the judge that he is able to feed both of his wives and will treat them fairly and justly.

2.1.3.3 Minimum Age

All ASEAN Member States have this requirement. The minimum age varies from 15-21 years old. Having reviewed the minimum age, it can be concluded that a couple must at least reach their maturity when entering into a marriage. Physically, a person reaches puberty. Mentally, such person is mature enough to distinguish good from bad.

With respect to the requirement of minimum age, countries the residents of which are dominated by Buddha and Hindu religions, have a slightly higher minimum age than the other countries. It can be understood that in their understanding, women after their first menstruation, still need to have education and emotional preparation before entering into a marriage.

2.1.3.4 Solemnization or registration of marriage

The ASEAN Member States stipulate that a marriage should be registered in the civil registrar office or by a appointed registrar office. It shows that registration is an important element in a marriage. Several ASEAN Member States stipulate that registration is an important element, namely the milestone to state the legality of marriage.

Cambodia, Lao PDR, Thailand and Vietnam clearly state that marriage must be registered. Therefore, unregistered marriage is considered as void, or state that a marriage is valid as of the date of registration. All of those states consider a marriage as civil relationship between a husband and wife. Even though there is a religious or traditional ceremony involved in the solemnization of marriage, it will not influence or raise any legal consequences between the parties to the marriage in the eye of the state. Such ceremony does not give any effect on the legality of marriage.

In Vietnam, the marriage law stipulates civil marriages. It does not position a matrimonial ceremony as the validation of marriage. However, it stipulates religious values by enforcing a provision that a spouse must respect the faith of his/her spouse. This can be an excellent point for inter-faith mixed marriages in Indonesia.

The states of Brunei, Indonesia, Malaysia, the Philippines and Singapore stipulate that a marriage is valid if it is solemnized according to its particular request. In case of Brunei, Indonesia, Malaysia, the Philippines and Singapore, a marriage has to be solemnized by an authorized officer or *juru nikah* in front of two credible witnesses and has a valid marriage license. In Indonesia, the solemnization of marriage is performed according to the religion of the respective couple. After solemnization, the marriage shall be followed by registration at the appointed registrar office.

Myanmar acknowledges a marriage by registration and also by reputation. The essence of marriage is consent of both parties to enter into a marriage.

Those countries mention that registration is a must, but, it appears that registration is not a requirement for the validity of marriage. At least, it is stated that non-registration of marriage shall not be the only reason to state a marriage is void, illegal or invalid.

Those states acknowledge that a marriage is more a civil relationship between a husband and wife. Brunei, Indonesia, Malaysia, and the Philippines acknowledge religious values in a marriage, while Myanmar, Singapore and (also) Indonesia acknowledge a marriage based on the customary law.

2.2 Particular Issues in a Marriage

2.2.1 Same-sex marriage in the ASEAN Member States

Based on the marriage regulations as described previously, the ASEAN Member States only allow a marriage between a man and woman or heterosexual couple. A same-sex marriage is forbidden, particularly in countries which tightly use religious principles such as Brunei, Indonesia, Malaysia and the Philippines.

Amongst the ASEAN Member States, Myanmar, Thailand and Vietnam are known as friendly countries for a same-sex marriage. However, Thailand and Vietnam forbid or do not recognize a same-sex marriage in their legal system, including domestic partnership or civil union. Their societies tolerate a couple who do so. In Thailand, the bill of same-sex marriage is under discussion though it still has no result. The same situation occurs in Vietnam.

Singaporean scholars mention that Singapore needs to see the reaction of the society as to whether or not they can receive a same-sex marriage as a new model of family.[889]

Brunei, Indonesia, Malaysia and the Philippines are very far from allowing this same-sex marriage, as they still highly hold religious values in a marriage.

2.2.2 Man, woman and the third gender (Person with Disorder of Sexual Development)

In relation to heterosexual requirement, only Singapore definitely stipulates that a woman or man include a person who undergoes transgender surgery and or vice versa. This requirement is interesting since sexual identity re-construction cases are increasing, not only in Indonesia. These cases are not the same as transgender surgery; however,

[889] Leong Wai Kum, *Op.Cit.,* pp.36-38.

provisions of the Women's Charter on who man or woman can be adopted for legal certainty of a couple's sexual identity.[890]

Persons with Disorder of Sexual Development (DSD) exist. In Indonesia, there is a group of *Bissu,* religious leaders of the traditional religion of Bugis.[891] Physically, they are not women nor men. Nowadays, they are known as Persons with DSD, namely persons who have ambiguous genital organ or sex ambiguity. These persons have symptoms, anatomy and or physiologic doubt as to whether or not they are men or women. Previously, this condition is known as intersex.

The terminology intersex refers to a traditional sexual condition, man and woman, whereby this particular situation is in between the two conditions. Genital organs, either external or internal, are between a man and woman.[892]This condition can happen once

[890] Tiurma M.P. Allagan, *Are You (Wo)Man Enough to Get Married?,* Indonesian Legal Review, Vol.6 No.3, 2016, pp.345-368.

[891] *Ibid.,* Bissu in Bugis tribe is a classic phenomenon which is nowadays known as person or patient with DSD. These days, those people can be advised to have treatment to determine their sexual identity. Hormone therapy up to reconstruction surgery can be performed to assist them to become a man or woman, according to a doctor's diagnosis. They become a medium between their god and human beings; therefore, their role is important in the society. They become the guardian of ancestors' heritage and play an important role in traditional ritual ceremonies.

[892] In Indonesia, these cases are more popular since the case of AH which is popular was decided in 2014. AH (man) and JD (woman) met in 2008 in a women golf country club in which AH was a member. In the same year, they got married in Los Angeles as stated in the State of Nevada Marriage Certificate and it was registered in the Indonesian Embassy of the state concerned. They married without any approval from the bride's parents. AH's mother-in-law objected to their marriage. The case was brought before an Indonesian court. First, AH was accused of committing an identity fraud, but AH was released from this criminal case in 2011. During the criminal case, in 2010, AH had a decision from the Jayapura District Court that allowed him to have a correction in his legal documents from a woman to be a man. JD was faithful to her husband during the hearing of the criminal case. But when it was over, JD claimed against AH for a tort (*onrechmatige daad*) for using her inability to lead her to a marriage and use her money for his own purpose. She also asked the court to cancel their marriage on the basis that their marriage is a same-sex marriage which is forbidden in Indonesia. JD asked for divorce as a reply. It is interesting to note that the judge of the South Jakarta district court stated that administratively, AH is indeed a man as stated in a decision of the Jayapura District Court. The judge considered the results of physical examination by a forensic expert stating that AH is a man with *klinefelter* syndrome and he took bilateral mastectomy. He has a penis although it is not normal, testes (the primary genital of a man) and has no vagina. The geneticist mentioned that genetically, AH has a woman chromosome. The judge concluded that even AH is a man, but he is not a real man. The judge disregarded the expert's testimony that AH is a man with *klinefelter* syndrome. The judge concluded that AH is a woman and also considered the inability of the claimant. The judge considered the claimant's argument that she is deaf, mute and has a particular mental or psychical condition as well as is manipulated by AH for his own interest. Notwithstanding authority of the judge to adjudicate the case and to decide that AH is a woman, it is worth to re-considered what is a man and woman according to medical perspective in the condition of AH.

out of 4,500 births, so-called as "*ambiguous genitalia*".[893] Nowadays, endocrinologists refer to this situation as the "Disorders of Sexual Developments (DSDs)".[894]

Sometimes, for civil registration purpose or other purposes, parents or doctors immediately determine the gender of babies. It is actually natural; however, this decision-in-a-rush can be error-prone for persons with DSD. In some cases, this error can be identified years after the babies have grown up. It appears that babies are determined as "girls" show masculinity or do not have any menstruation or breast in her teenage or puberty period, or vice versa.

In order to have a clear sexual identity, a person with DSD needs medical assistance, from a hormonal therapy to a reconstruction surgery by a team of doctors. Such medical reconstruction, in some cases, needs to be followed by a correction in sexual identity stated in legal documents. In Indonesia, a correction in legal documents can only be made through a district court decision which becomes legal evidence of the sexual identity of the person concerned. Based on the court district decision, the registrar officer shall make a necessary correction in the civil records, particularly in the sexual identity of the person concerned which usually includes a change of name of the person.

2.2.2.1 Treatment and handling of Persons with DSD

Persons with DSD can have a hormonal therapy and even, medical surgery for reconstruction. If the patient is a male, the purpose of the therapy is to support the masculinity and suppress the feminism by giving testosterone. If the patient is a female, the same principle of handling is required. The hormonal therapy usually starts when a patient enters the teenage period. The hormonal therapy must be given for the rest of his or her life to maintain the characteristics. A reconstruction surgery can be performed gradually. A person with DSD or ambiguous genitalia needs a holistic handling to cover not only medical aspect, but also psychological, social and legal aspects.[895]

According to the consensus of pediatrics, the treatment or handling of ambiguous genital patients can be optimal if the gender of babies are not yet determined. An evaluation

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[893] Bambang Widhiatmoko and Eddy Suyanto, *Legalitas Jenis Kelamin pada Penderita Ambiguous Genetalia di Indonesia (translation from the Author: Sexual Identity Legality of Ambiguous Genitals Patients in Indonesia), Jurnal Kedokteran Forensik Indonesia*, Vol. 15 No.1, Jan-March 2013, pp.15-18.

[894] Mh. Faradhaz Sultana, *Kelamin Ganda penyakit atau Penyimpangan Gender*, 2011.There are several categories of DSD and each category has its own symptoms and physical characteristics, namely: (1) 46,XY DSD (previously known as the "Male Pseudo-hermaphrodite"); (2) 46,XX DSD (previously known as the "Female Pseudo-hermaphrodite"); (3) Ovotesticular DSD (previously known as the "True Hermaphroditism"); (4) XY sex reversal 46,XYcomplete Gonadal Dysgenesis and Partial Gonadal Dysgenesis; (4) XY sex reversal 46,XYcomplete Gonadal Dysgenesis and Partial Gonadal Dysgenesis; (5) 47, XXY (Klinefelter syndrome). For further discussion, please see Bambang Widhiatmoko and Eddy Suyanto, *Op.Cit.*, pp.16-18. See also Joel Hutcheson, et. al, "*Disorder of Sex Development*", accessed on June 4,2016. http://emedicine.medscape.com/article/1015520-overview.

[895] Bambang Widhiatmoko and Eddy Suyanto, *Op.Cit.*, pp.17-18.

conducted by a competent and experienced expert is required to make determination. Babies need several examinations before they are classified as boy or girl for civil registry purpose. The diagnosis needs to be accepted in a good manner by all parties, particularly the parents. Communication between patients and family and their participation in decision-making are important.[896]

Early evaluation or examination can be conducted by child endocrine expert, but medical handling needs more cares. Treatment and handling generally must be performed gradually. In some cases, a surgery needs to be done before a patient reaches 2 years old. Handling by a psychologist or psychiatrist is a must for a patient beyond 2 years old. According to Indonesian regulations, a team must consist of a pediatric subspecialist in endocrinology, surgery or urology or both, psychologist or psychiatrist, gynecology, genetics, neonatology, and if possible, social worker and medical ethics.[897] Formation of the team depends on the type of disorder, local resources, development context and location.

Persons with DSD are not the same as transsexual persons. Transsexual is a psychological disorder. Genital organs of the person can be identified easily, as it is clear: a man or woman. However, the soul inside him/her feels that he/she is trapped inside a wrong body as it has the opposite genital.[898] Then, he or she acts according to his or her feelings. Sometimes, the feeling is consequently passionate until the person concerned makes a decision to have a sexual transgender surgery, hereinafter called as the "re-assignment surgery".

2.2.2.2 Capacity to Marry as One of the Legal Consequences

The district court decision after granting the request mentions that data in the legal documents shall be amended and furthermore, the person shall be identified as having the gender as mentioned in the respective decision, along with any legal consequences arising from the new sexual identity. Therefore, the legal position including his/her rights or obligations will correspond to the sexual identity as stated in the latest legal documents which are revised based on the district court decision.

In relation to marriage capacity, as the requirement for a marriage is heterosexual, the person can only marry the opposite sex of his/her latest sexual identity. If the decision of a district court mentions that now, the claimant is a man, he can only marry a woman and vice versa. For the avoidance of doubt, it is advisable if this situation can be addressed and regulated. At least, regulation providing for that sexual identity of a man

[896] *Ibid.*

[897] Decision of the Minister of Health No.292/MENKES/SK/III/1989 dated June 12,1989 regarding plastic surgery and reconstruction.

[898] Bambang Widhiatmoko and Eddy Suyanto*, Ibid.*

and woman shall be proven according to the latest identity card issued according to Indonesian Civil Administration or any district court decision, as relevant and necessary – bearing in mind that those situations are not the same as transgender sexuality.

3 Notes and Conclusions

1. Marriage is regulated in each ASEAN state and is stated as a relationship by consent of a man and woman, exclusive only to both of them, to live together as husband and wife. The form of marriage varies within the ASEAN Member States, but most of them apply the civil system.
2. Based on the definition of marriage, a marriage is required to be between one man and one woman; it means that a marriage must be monogamous. A polygamous marriage and or polyandry marriage are prohibited. If a marriage has the purpose of having descendants, a polygamous marriage is allowed. However, it is possible with very tight requirements, for instance, it must have prior approval from a district court.
3. A marriage also requires consent from each party to the marriage equally, each from the man and woman. Consent also must be free from duress, conceit, suppression, fraud or intimidation. Any existence of one of such action scan is ground for annulment of the marriage as of the date of its establishment.
4. Parties to a marriage must be between a man and woman. Even though there are several gay-friendly-states, but all states in ASEAN only stipulate legal relationship arising between a man and woman as husband and wife.
5. Those states also regulate the minimum age to enter into a marriage. The basic principle of minimum age is that each person who has the intention to enter into a marriage must be mature enough. It is for the population reason and for the happiness of the marriage itself. In addition, a marriage is prohibited between a man and woman who have a close blood relationship or consanguinity.

Chapter 6:
Mixed Marriage
in the ASEAN Member States

1 Introduction

After having discussed the substantive requirements of the marriage of ASEAN Member States, this chapter will elaborate provisions on marriage which have foreign elements.

The center of discussion will be (a) the applicable law to determine citizens' capacity to marry, (b) solemnization of marriage within the territory of the state when one of the couples is a foreign national, (c) solemnization of marriage outside the territory of the state where a couple are its citizens and (d) registration after the couple concerned return to their original country. This chapter will also include discussion of comparison of the above regulations with Indonesia.

Following the previous pattern, this chapter will describe the ASEAN Member States in an alphabetical order, namely Brunei Darussalam, Cambodia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam.

2 International Mixed Marriage in the ASEAN Member States

2.1 Brunei Darussalam

2.1.1 Capacity to marry

The Brunei Laws apply the Principle of Domicile, thus its laws are applied to persons who have a domicile within the territory of Brunei and are permanent residents of Brunei. They also apply to persons who reside abroad but still have their domicile of Brunei. The domicile of Brunei is attached to persons wherever they go, even abroad, as long as they have no intention to have residency elsewhere.

Those provisions are reflected in the Brunei Islamic Family Law which applies to (at least one of) a couple who profess the Islamic religion and at least one of the couple, whether or not he/she professes the Islamic religion, is *bermukim* in Brunei Darussalam or is *bermastautin* in Brunei Darussalam but *bermukim* outside Brunei Darussalam.[899]

[899] Art. 5 of the Brunei Islamic Family Law. *"5. (Application) (1) Notwithstanding any contrary provisions in any written law, this Act shall apply in any matter in which at least one of the parties professes the Islamic religion and at least one of the parties, whether or not he professes the Islamic religion, is* bermukim *manner in*

In this provision "*bermastautin*" means permanently or ordinarily residing in a certain area, while "*bermukim*" means residing without the intention to "*bermastautin*" in a certain area whilst not being a traveler.

Based on the above, it means that the material or substantive requirements of the Brunei Islamic Family Law are applied to persons who profess Islamic religion and who have their residence within the territory of Brunei Darussalam. They are also applied to persons who have their domicile within the territory of Brunei Darussalam. Lastly, they are applied to persons who have to reside outside the territory of Brunei Darussalam, but have their domicile in Brunei Darussalam.

The Marriage Act states that if they are domiciled elsewhere other than Brunei Darussalam, they are subject to the local law where they have their domicile. Parties to a marriage must follow the local marriage law, including provisions on consanguinity or prohibition from marrying a couple with a certain degree of kinship.[900]

2.1.2 Administrative Requirements of Marriage

A marriage shall be solemnized according to the Brunei Islamic Family Law if the marriage is held within the territory of Brunei.[901]

2.1.3 Marriage outside Brunei Darussalam

The Brunei Islamic Family Law still applies to Brunei nationals or permanent residents who intend to marry outside the country. The registrar will issue a permission to them prior to examination as to whether or not they meet the substantive requirements to marry.

This situation is reflected in provisions of the Brunei Islamic Family Law. It states that Brunei nationals or permanent residents who intend to marry outside the country are required to obtain permission from a Registrar, at least 14 days before the intended marriage. The Registrar shall conduct investigation and if he/she is satisfied with all the requirements of the *Syara'* Law and Brunei Islamic Law, the Registrar will issue his/her permission.[902] Brunei citizens or permanent residents who are in a country other than

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Brunei Darussalam or is bermastautin *in Brunei Darussalam but* bermukim *manner outside Brunei Darussalam. (2) For the avoidance of doubt, it is hereby declared that no Court other than a Court established under Part II of Syariah Courts Act (Chapter 184) shall hear or determine any claims or proceedings where at least one of the parties is a Muslim and related with any matters arising in this Act."*

[900] Art. 3 (1)(c) of the Marriage Act. *"(1) No two persons shall be capable of contracting of a valid marriage unless the following conditions are fulfilled - … (c) if domiciled elsewhere than in the State, the parties to the intended marriage are not related to each other within a degree of kindred prohibited by the law of the country of their domicile."*

[901] Art. 5 of Brunei Islamic Family Law. See the text in the above footnote.

[902] Art. 18 (1), (2) and (3) of the Brunei Islamic Family Law. *"18 (Authorization to solemnise marriage abroad) (1) A citizen of Brunei Darussalam or permanent resident who intends to marry outside the country are*

Brunei Darussalam and intend to marry in that country shall inform the representative of Brunei Darussalam, if any, in that country. In the absence of such representative, they shall inform a Registrar in advance of the intended marriage.[903]

Having in mind the application of the Brunei Islamic Family Law, it appears that enforcement of the national law is inherent in its nationals and permanent residents similarly in nationality.

In relation to marriage solemnization abroad, the Brunei Islamic Family Law reflects the principle of *lex loci celebrationis.* Such marriage must be subsequently registered in a Registrar based on credible and acceptable proof or evidence. The officer shall examine the submitted evidence, marriage certificate or witnesses, as to whether or not the marriage is solemnized. However, such registration in Brunei does not affect the validity of marriage.

The provision above is reflected in Art. 29 and 32 of the Brunei Islamic Family Law. Such articles of the Brunei Islamic Family Law stipulate that a marriage in accordance with *Hukum Syara'* by a Brunei citizen or permanent resident which takes place outside the territory of Brunei Darussalam must be registered within six months after the first arrival of one or both parties in Brunei Darussalam. The couple or one of them must provide evidence, either verbal or documentary, that the marriage has taken place. Based on the provided evidence, a certified copy of entry in the Marriage Register shall be delivered to the respective couple.[904] However, the validity of marriage which takes place outside the territory of Brunei Darussalam does not depend or is not affected

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required to obtain permission from the Registrar. (2) For the purposes of subsection (1), an application shall be made to the Registrar in the prescribed form at least 14 days before the date of the intended marriage. (3) The Registrar shall, upon receiving an application under subsection (2), conduct an investigation and if he is satisfied that all the requirements of Hukum Syara*' and this Act have been complied with, he shall issue his permission in the prescribed form."*

[903] Art. 18 (4) of the Brunei Islamic Family Law. *"18. (Authorization to solemnise marriages abroad) … (4) Notwithstanding subsection (1), (2) and (3), a citizen of Brunei Darussalam or permanent resident who is in a country outside Brunei Darussalam and intending to marry in that country, or in the absence of a representative, shall inform the Registrar in advance of the intended marriage."*

[904] Art. 29 (1), (3) of the Brunei Islamic Family Law. *"29. (Registration of foreign marriages of citizens of Brunei Darussalam or permanent residents) (1) Every person who is a citizen of Brunei Darussalam or permanent resident and who has contracted a valid marriage in accordance with Hukum Syara' outside Brunei Darussalam, shall register the marriage within 6 months of the first arrival of one or both parties in Brunei Darussalam by appearing before any registrar and – (a) producing t the Registrar the certificate of marriage or such evidence, either oral or documentary, that the marriage did take place; (b) furnishing such particulars as may be required by the Registrar for the registration of the marriage; and (c)applying in the prescribed form for the registration of the marriage and subscribing the declaration therein. … (3) After the registration of a marriage under this section, certified copies of the entry in the Marriage Register signed by the Registrar shall be delivered or sent to the husband, the wife and, within such period as may be prescribed, to the Chief Registrar who shall cause all such certified copied to be bound together to constitute the Register of Muslim Marriage Outside Brunei Darussalam."*

merely to the registration or non-registration according to the Brunei Islamic Family Law.[905]

Similar provisions are also applied to a non-Muslim marriage which is solemnized or contracted outside the territory of Brunei Darussalam, as stipulated in the Registration of Marriage Act. It stipulates that a marriage solemnized or contracted outside the territory of Brunei Darussalam, other than for an Islam couple, may be registered if the parties to such marriage appear before a Registrar. [906]

The couple shall produce evidence which can satisfy the Registrar. The evidence may be in a verbal form stating that their marriage has taken place or evidence of cohabitation and repute that they have lived together as husband and wife. The evidence may also be a document of both, which is sufficient to satisfy the registrar. In this case, the registrar shall have the power of a magistrate for the summoning and examination of witnesses and the administration of oaths and affirmations.[907]

Subsequently, the parties fill in and subscribe a declaration. The registrar may ask questions and obtain answers, as he/she may think fit for explaining or substantiating the statements made in the declaration. The Registrar may vary the form, in case that the parties profess no religion or are married otherwise than by a ceremony.

The Registrar may refuse to register the marriage if he/she is not satisfied with the truth of any statement made to him/her. He/she is also authorized to postpone the registration, in case that he thinks he needs more evidence of the marriage concerned.[908]

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[905] Art. 32 of the Brunei Islamic Family Law. *"Nothing in this Act or rules made under this Act shall be construed to render valid or invalid any marriage that otherwise is invalid or valid, merely by reason of its having been or not having been registered."*

[906] Art. 5 of the Registration of Marriages Act. *"5. (Registration of marriages solemnised or contracted outside Brunei Darussalam) (1) Any marriage solemnised or contracted outside Brunei Darussalam, other than a marriage both parties to which professed at the time of such marriage the religion of Islam may be registered if – (a) the parties to such marriage shall appear before the Registrar and shall produce to the Registrar such evidence either oral or documentary as may be satisfy the Registrar that such marriage took place: provided always that evidence of cohabitation and repute that they have lived together as man and wife may suffice to satisfy the Registrar; and (b) the parties shall fill in and subscribe a declaration in the form in the Second Schedule to this Act in the presence of the Registrar and shall answer such questions as the Registrar may think fit to put to them for the purpose of explaining or substantiating the statements made in the said declaration: provided that the Registrar may vary the said form in any case in which the parties profess no religion or are married otherwise than by a ceremony; (c) the prescribed fees are paid. (2) The Registrar shall register a marriage by entering the particulars thereof in the register."*

[907] Art. 9 of the Registration of Marriage Act. *"9. (Power of Registrar) For the purposes of this Act every Registrar appointed under this Act shall have all the powers of a magistrate for the summoning and examination of witnesses and the administration of oaths and affirmations."*

[908] Art. 10 of the Registration of Marriage Act. *"10. (Refusal or postpone of registration) (1) If the Registrar is not satisfied of the truth of any statement made to him he may refuse to register the marriage or if he requires evidence with regard to any particulars required to be registered he may postpone registration and he may call any further evidence that he thinks necessary: provided that the Registrar shall record in the Registrar's Note Bool his reasons for any such refusal or postpone. (2) If the Registrar has reason to believe on*

If the registration is submitted by only one of the couple, the register may dispense with it if he/she is satisfied that there are reasonable grounds for the absence of the other party and entry in the Marriage Register must include a statement on the grounds for absence.[909] In relation to this registration, it is stated that the validity of marriage which takes place outside the territory of Brunei Darussalam shall not be affected by the registration or non-registration pursuant to this act.[910]

2.1.4 Comparison with Indonesia

2.1.4.1 Capacity to marry

In relation to the capacity to marry, Brunei is on the opposite side of Indonesia. Brunei determines that the Brunei Islamic Family Law applies to a person who is *bermukim* (have a domicile) in Brunei Darussalam or is *bermastautin* in Brunei Darussalam but *bermukim* outside Brunei Darussalam. *Bermastautin* is permanently or ordinarily residing in a certain area, while *bermukim* means residing without the intention to *bermastautin* in a certain area whilst not being a traveler. This is reflected in the application of the Principle of Domicile. Having observed the provision, it is worth noting that the attachment of Brunei Laws to its citizens and permanent residents is inherent. In relation to the substantive requirements to marry, it is similar to nationality. The Brunei Islamic Family law still applies to Brunei citizens or permanent residents should they would like to marry abroad.

The Marriage Act stipulates that if a Brunei national has a domicile elsewhere or outside the territory of Brunei Darussalam, parties to a marriage are subject to the law of the

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the evidence of any person that a marriage between the parties is prohibited by the institution of the religion professed by either party, or if both profess the same religion by the institution of that religion, or by the law or custom having the force of law applicable to either party he shall refuse to register the marriage. (3) In any case in which the parties profess different religions the Registrar may, if he thinks proper, refuse to register the marriage. (4) The Registrar shall not register any marriage unless one of the parties thereto is ordinarily resident within Brunei Darussalam. (5) there shall be no appeal from the cancelation by a Registrar of the registration of a marriage or from the refusal of a Registrar to register a marriage, but such refusal shall not debar of the same or another Registrar from registering it if subsequently satisfied that the grounds for his refusal to register either did not exist or have since been removed."

[909] Art. 29 (2) of Brunei Islamic Family Law. *"29. (Registration of foreign marriages of citizens of Brunei Darussalam or permanent residents) … (2) The Registrar may dispense with the appearance of one of the parties if he is satisfied that there are sufficient reasonable grounds for the absence of the party and in that event the entry in the Marriage Register shall include a statement of the grounds for the absence. … "*

[910] Art. 11 of Registration of Marriage Act. *"11. (Validity of a marriage not affected by registration or non-registration) Neither the registration of nor the omission to register any marriage shall affect the validity of the marriage nor shall any error in the particulars recorded nor any omission to record any particular which ought to have been recorded affect the validity of the registration of the marriage."*

country of their domicile, particularly in relation to prohibition of the degree of kinship.[911]

In relation to a stateless person and person of dual or multiple nationalities, the applicable law shall be the law of domicile of the stateless person and person of dual or multiple nationalities. The particular situation, that a person does not have any nationality or has two or more nationalities, does not affect the applicable law. It is so because determination of the same depends on the territory where he/she has a domicile, instead of nationality.

The provisions above give no possibility of the application of *renvoi* in Indonesia, because the Brunei national laws attach to its citizens almost similarly to nationality. In the event that a non-Moslem national of Brunei Darussalam having his/her domicile in Indonesia would like to marry, the Marriage Act still applies. An exception is made with respect to prohibition of the degree of kinship, as the Brunei Marriage Act refers directly to the domicile law of the person. In this case, the Brunei Marriage Act allows MA 1974 to apply.

A marriage by an Indonesian citizen in Brunei Darussalam must be in line with the requirements applied in Brunei, while he or she remains subject to the requirements stipulated in MA 1974.

2.1.4.2 Solemnization and registration of marriage

Brunei Darussalam laws, either the Brunei Islamic Family law or Brunei Marriage Act, do not mention any provision on the conflict of rules or PIL. They do not mention whether or not they recognize marriage solemnization based on the local law, pursuant to the principle of *lex loci celebrationis*. However, they will recognize a marriage if it meets the standards of Brunei laws.

The above matter is reflected in provisions providing for that a registrar will administer the evidence of cohabitation and repute stating that a couple have lived together as husband and wife. If the registrar is satisfied with the evidence, he/she will make the registration. However, if the registrar is not satisfied, he/she is authorized to refuse to do so. From the provisions above, Brunei Darussalam shall judge as to whether or not a marriage is in line with the laws and regulations of Brunei Darussalam.

In addition, it is mentioned that the validity or invalidity of marriage is not affected by registration in Brunei Darussalam. In relation to it, Brunei Darussalam does not

[911] Art. 3 of Brunei Marriage Act. "3. … (c) if domicile elsewhere than in the State, the parties to the intended marriage are not related to each other within a degree of kindred prohibited by the law of the country of their domicile; …"

automatically recognize a marriage solemnized abroad although it is solemnized according to the local law.

MA 1974 stipulates differently that Indonesia recognizes a marriage which takes place abroad, if such marriage is solemnized according to the local law, provided that such marriage does not contradict MA 1974.

2.2 Cambodia

A marriage between a Cambodian national and foreign national that takes place in Cambodia or abroad is governed by the Cambodian Law. A marriage between Cambodian nationals and between a Cambodian national and foreign national which takes place abroad shall be recognized if only it is according to the Cambodian Law and is registered in the Cambodian representative office or embassy.

In addition to being subject to the Cambodian Civil Code, such marriage is also governed by regulations which particularly state provisions on the process and legal procedure for a marriage between a Cambodian national and foreign national, namely the Law on Marriage and Family of 1989 and Sub-decree No. 183 ANKR.BK dated November 3, 2008 (hereinafter referred to as "Sub-decree No. 183").[912] Sub-Decree No. 183 states clearly that a marriage between a Cambodian national and foreign national is subject to the relevant laws and regulations of the Kingdom of Cambodia.[913]

2.2.1 Capacity to marry

In relation to the capacity to marry, Cambodian nationals must comply with the Cambodian Civil Code. Thus, Cambodian nationals must reach 16 years old or obtain parental or guardian consent. They must be single and can re-marry if the previous marriage has been legally dissolved. The Civil Code also prohibits a marriage between relatives by consanguinity or affinity. In relation to foreign nationals, they must submit a marriage request along with several documents from their original state.

[912] The Law on Marriage and Family was promulgated on July 18, 1989. Except for Articles 76, 77, 79, 80 and 81, all other provisions of this law are abrogated by the Cambodian Civil Code. Art. 79 and 80 of the Law on Marriage and Family are about a marriage in a foreign country and marriage with a foreigner. Sub-decree of the Royal Government of Cambodia No. 183 ANKR.BK regarding the Process and Legal Procedure of Marriage Between Cambodian Citizen and Foreign National. See also *"Marriage Process between a Cambodian Citizen and a Foreign National in Cambodia"* in BNG Legal Newsletter April 2017, pp. 1-2.

[913] Art. 2 of Sub-Decree No. 183. *"2. The marriage between the Cambodian citizen and foreign national shall be on a voluntary and self-willing basis and shall abide by the relevant laws and standards of the Kingdom of Cambodia."*

Cambodia requires foreign nationals to provide an official statement that they are eligible to marry. Such statement must be translated and legalized.[914] Based on the request and submitted legal documents, an officer shall make consideration. These requirements reflect that Cambodian laws apply to foreign nationals, while they must also comply with their national law.[915] In addition to the requirements above, the Cambodian Ministry of Foreign Affairs issued a Diplomatic Note that imposes additional requirements to foreigners who intend to marry a Cambodian woman. Such Diplomatic Note mentions that foreign men who are 50 years old or older or who earn money less than $2,500 per month cannot or are prohibited from marrying a Cambodian woman.[916]

The limit of 50 years old is taken for (usually) people over 50 years old are no longer fit for reproduction. Such age is considered prone to health problems and close to retirement. There is a high possibility that the wife will become an obligatory nurse of the husband or she may be forced to work after his retirement. At that age, people might already have their previous family and thus, there is a possible conflict between the wife and previous family. The limit of $2,500 is a basic criterion for being able to feed two persons. The amount should be able to ensure that the man can maintain a decent living condition, which does not give any pressure on the wife to get a job. The wife can have a job if she is willing to do so. However, before the wife gets used to the new society or is fit to have a job, the husband must be able to raise the family with his income.[917]

A marriage between a Cambodian national and foreign national is susceptible to manipulation by criminal elements. Therefore, the Cambodian government adopts strict provisions to prevent illegal activities from happening across international borders. Sub-

[914] Art. 6 of Sub-decree No. 183. *"6. Foreign national shall submit the marriage request with a completed application form to the Ministry of Foreign Affairs and International Cooperation of the Kingdom of Cambodia with the attached documents as of follows: - Marriage request; - Copy of passport and entry visa into Cambodia; - Certificate of celibacy or late Spouse's Death Certificate issued by an officially recognized institution of the country of origin of the foreign national; - Medical certificate issued by an officially recognized medical institution of the Kingdom of Cambodia; - Criminal record issued by an officially recognized institution of the country of origin of the foreign national; - Certificate on profession and monthly income issued by an officially recognized institution of the country of origin of the foreign national. Copy of passport and certificate of celibacy or late Spouse's Death Certificate shall be legalized by the Embassy or the representative office of the applicants for the Kingdom of Cambodia.*

[915] See the requirement of *Certificate of celibacy or late Spouse's Death Certificate issued by an officially recognized institution of the country of origin of the foreign national in Art. 6 of Sub-Decree No. 183.*

[916] The Diplomatic Note of the Cambodian Minister of Foreign Affairs dated March 7, 2011. See the US Diplomatic in Cambodia, *Getting Marriage in Cambodia*, available at https://kh.usembassy.gov/u-s-citizen-services/local-resources-of-u-s-citizens/getting-married-in-cambodia/, accessed on November 15, 2016. Due to the form of the Diplomatic Note, these requirements are stated as not statutory or regulatory. See *"Marriage Process between a Cambodian Citizen and a Foreign National in Cambodia"* in BNG Legal Newsletter April 2017, p. 2.

[917] The above requirements are about to avoid manipulation and criminal acts. See *"Marriage Process between a Cambodian Citizen and a Foreign National in Cambodia"* in BNG Legal Newsletter April 2017, pp. 1-2.

decree No. 183 prohibits a marriage arranged by recruiting agencies, brokers and exploitative companies. It also prohibits a fake marriage to avoid forced labor, human trafficking, prostitution or sexual exploitation.[918] In particular, a foreign national must be present physically in Cambodia for marriage solemnization as will be describe below.

2.2.2 Administrative Requirements of Marriage

A marriage between a Cambodian national and foreigner in Cambodia must be according to the laws of the State of Cambodia.[919] Solemnization of marriage between a Cambodian citizen and foreign citizen must be according to Sub-Decree No. 183.

Sub-decree No. 183 states that a foreign national who has the intention to marry a Cambodian citizen must be physically present in the territory of Cambodia, in order to complete the process and legal procedure for his or her marriage.[920]

To start a marriage process, a foreign national must submit a marriage request, attached with certain documents, among others, certificate of celibacy, criminal record, and certificate of profession and monthly income.[921] The Cambodian citizen must also submit a marriage request, attached with certain documents, among others, certificate of celibacy. The certificate of celibacy can be replaced by a death certificate of the former

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[918] Art. 3, 4 of Sub-decree No. 183. *"3. Strictly prohibit any marriage arranged by the recruiting agencies, brokers, and exploitative companies. 4. Strictly prohibit fake marriage for the purpose of forced labour, trafficking in persons or sexual exploitation."* See also *Ibid*.

[919] Art. 80 of the Law on Marriage and Family of 1989. *"80. Marriage between a Cambodian citizen and foreigner in Cambodia shall be held according to the laws of the State of Cambodia."*

[920] Art. 5 of Sub-decree No. 183. *"5. Foreign national, who intends to get married with Cambodian citizen, shall be required to be physically present in the Kingdom of Cambodia so as to complete the process and legal procedure of marriage."*

[921] Art. 6, 7 and 8 of Sub-decree No. 183. *"6. Foreign national shall submit the marriage request with a completed application form to the Ministry of Foreign Affairs and International Cooperation of the Kingdom of Cambodia with the attached documents as of follows: - Marriage request; - Copy of passport and entry visa into Cambodia; - Certificate of celibacy or late Spouse's Death Certificate issued by an officially recognized institution of the country of origin of the foreign national; - Medical certificate issued by an officially recognized medical institution of the Kingdom of Cambodia; - Criminal record issued by an officially recognized institution of the country of origin of the foreign national; - Certificate on profession and monthly income issued by an officially recognized institution of the country of origin of the foreign national. Copy of passport and certificate of celibacy or late Spouse's Death Certificate shall be legalized by the Embassy or the representative office of the applicants for the Kingdom of Cambodia.*

7. The Ministry of Foreign Affairs and Internal Cooperation of the Kingdom of Cambodia shall have a task to check and advise on the request application of the foreign national for marriage with the Cambodian citizen and shall notify the foreign national within five working days. The Minister of Foreign Affairs and International Cooperation shall refer the request to the Ministry of Interior and notify relevant institutions after having checked and advised on the request application documents of the foreign national.

8. After having received the marriage request application of the foreign national from the Ministry of Foreign Affairs and International Cooperation, the Ministry of Interior shall: - register the marriage request application of the foreign national and notify the foreign national within five working days; - notify the registration officials at the commune/Sangkat of the permanent residence of the Cambodian citizen about the marriage request; - check the formality of the documents issued by the registration officials at the commune/Sangkat of the permanent residence of the Cambodian citizen."

spouse, to prove that he or she is eligible to marry. Both requests shall be processed simultaneously by a registration official.[922]

After checking the request and documents, the officer shall issue a marriage notice based on the physical presence of both applicants. The marriage notice shall be sent to the relevant embassy or representative office. If there is no complaint or opposition to the marriage within 10 days, both applicants are able to get married.[923]

The marriage is valid only if the couple concerned sign a marriage registration before the registration official and two credible witnesses.[924] Based on such signature, the Minister of Interior shall further process the marriage pursuant to the regulation as relevant.[925]

2.2.3 Marriage outside Cambodia

In relation to marriage solemnization taking place abroad, the Cambodian Civil Code stipulates that a Cambodian national abroad who wishes to marry may effect notification, public notice and conclusion of the contract of marriage in the presence of a Cambodian Ambassador, Minister or Consul accredited to that country and registers

[922] Art. 9 of Sub-decree No. 183. *"9. The foreign national shall submit the marriage request to the registration officials at the commune/Sangkat of the permanent residence of the Cambodian citizen after his/her marriage request application is checked, advised and registered. The Cambodian citizen, who gets married with the foreign national, shall submit the marriage request application with the registration officials at the commune/Sangkat of his/her permanent residence with the attached documents as follows: - Marriage request; - Copy of birth certificate; - Certificate of celibacy or late Spouse's Death Certificate issued by commune/Sangkat chief of the permanent residence of the Cambodian citizen; - Medical certificate issued by an officially recognized medical institution of the Ministry of Health of the Kingdom of Cambodia. Marriage request and other documents of the Cambodian citizen and foreign national shall be in tandem submitted to the registration officials at the commune/Sangkat of the permanent residence of the Cambodian citizen abiding by the process and legal procedure of the registration work."*

[923] Art. 10 of Sub-decree No. 183. *"10. Registration officials at the commune/Sangkat shall have a task to check and make decision on the marriage request of both applicants at a latest period of three working days after having received the marriage request and other required documents. After having checked the request and required documents of both applicants basing primarily on policy and law, the registration officials are required to issue a marriage notice with physical presence of both applicants in front of the registration officials at the commune/Sangkat of the permanent residence of the Cambodian citizen. Marriage notice shall be disclosed within 10 days at the Embassy or representative office of the foreign national to the Kingdom of Cambodia at the permanent residence and the commune/Sangkat office of the Cambodian citizen in accordance with the process and legal procedure of the registration work. If there is no complaint or opposition to the marriage within 10 days, both applicants shall be able to get married.*

[924] Art. 11 of Sub-decree No. 183. *"11. The marriage is legal only if both applicants sign a letter of marriage registration in front of the registration officials at the commune/Sangkat, which both applicants submit the marriage request, with two adult witnesses in accordance with the process and legal procedure of the registration work."*

[925] Art. 11 of Sub-decree No. 183. *"12. The Ministry of Interior shall instruct the communal registration officials, local authorities and relevant units on the sample of application letters, process, and legal procedure in relation to the marriage application between Cambodian citizen and foreign national. The Ministry of Foreign Affairs and International Cooperation shall issue an instruction on the sample of application letters, process, and legal procedure in relation to the marriage application between Cambodian citizen and foreign national."*

the marriage. The public notice as required above shall be effected by posting a notice at the Cambodian diplomatic establishment in the relevant country.[926]

A marriage according to the foreign law of a couple's residency falls under the Law of Marriage and Family of 1989. It is stated that a Cambodian national can marry a foreign national, regardless of their country of residence. In the event that a marriage between a Cambodian national and foreign national taking place abroad would like to be recognized under the Cambodian Laws, the couple must register their marriage with the Cambodian representative office or embassy in the country where the marriage is held. If the married couple later return and settle in Cambodia, they must register their marriage.[927]

Sub-Decree No. 183 qualifies the provisions above with its Art. 5 by requiring a foreign national who wishes to marry a Cambodian national to be physically present in Cambodia. His/her presence is a must in order to complete the procedural marriage requirements.

2.2.4 Comparison to Indonesia

2.2.4.1 Capacity to marry

Cambodia and Indonesia apply their national laws to determine the capacity to marry. Thus, there is no possibility of the application of *renvoi* in determining the applicable law. The fulfillment of requirements to marry must be proven by a certificate of celibacy or a certificate of ability to marry issued by an official institution of the relevant state.

Although Cambodia and Indonesia apply their national laws to determine the capacity to marry, there is a huge difference between them. Cambodia has the additional requirements for foreign men who have the intention to marry a Cambodian woman. They must prove that they are under 50 years old and earn money in a particular amount. These requirements apply only to foreign men, while no such requirement is applied to

[926] See Art. 957 of the Cambodian Civil Code. *"957. (Formalities of marriage between Cambodians outside Cambodia) (1) Cambodians abroad wishing to marry may effect notification, public notice and conclusion of the contract of marriage in the presence of a Cambodian Ambassador, Minister or Consul accredited to that country, and register the marriage. (2) The public notice described in paragraph (1) shall be effected by posting a notice at the Cambodian diplomatic establishment in the relevant country."*

[927] Art. 79 of the Law on Marriage and Family. *"Marriage between a Cambodian citizen and Cambodian citizen or between a Cambodian citizen and foreigner living in a foreign country must be held before the registrar of the embassy or consulate of the State of Cambodia which is located in the country where both party reside. Marriage between a Cambodian and Cambodian or Cambodian citizen and foreigner, which is formally held according to marriage procedure described by the law of the marriage, shall be recognized as being valid in the State of Cambodia as long as such marriage is not against the provisions of the laws of the State of Cambodia. A marriage certificate or a copy of the marriage certificate must be registered in a registration book of the embassy or consulate of the State of Cambodia. The State of Cambodia shall enter the marriage certificate or copy of the marriage certificate in the registration book of the Commune or Section in the jurisdiction where both spouses reside."*

foreign women who have the intention to marry a Cambodian man. It does not reflect equal treatment between foreign men and foreign women who have the same intention. In relation to the requirements, Cambodia applies the Principle of Nationality with additional requirements which are independent of domicile or residence.

In relation to a stateless person and person of dual or multiple nationalities, the Cambodia marriage law and MA 1974 are silent. However, Indonesia fills this vacancy by scholars' opinion. They are of the opinion that the applicable law of a stateless person shall be determined according to the local law of his/her residence. The domicile of the stateless person concerned is the point of contact to determine the applicable law. Therefore, MA 1974 is applied to the stateless person concerned. With respect to a person of dual or multiple nationalities, Indonesian scholars are of the opinion that the applicable law shall be determined according to the most effective nationality – instead of domicile or residence. In relation to a permanent resident, both are silent.

2.2.4.2 Solemnization and registration of marriage

The Cambodian Laws and MA 1974 regulate slightly differently in relation to a marriage taking place abroad. Cambodia requires that marriage solemnization must be within its territory. The Cambodia Civil Code requires that a marriage between Cambodian nationals taking place abroad must be conducted in its embassy or its representative office.

Indonesia has such provisions, but a marriage at the Indonesian Embassy is not a must. An Indonesian couple also has a chance or option to be subject to the local law of the country where the marriage takes place, provided that they must register their marriage after they return to Indonesia.

In relation to the recognition of marriage taking place abroad, by the existence of Sub-Decree No. 183, a Cambodian national will never have marriage solemnization other than by its national law. Therefore, marriage recognition has almost never happened. In the event that marriage recognition occurs, the recognition shall only be possible if such marriage does not contradict the Cambodian laws and is registered in the Cambodia representative office or embassy.

Indonesia regulates differently. It directly allows, in MA 1974, a marriage of Indonesian nationals to take place abroad. It also gives an option if the couple would like to have a marriage or marriage registration at the Indonesian embassy or representative office. A marriage taking place abroad is recognized as long as it does not contradict a provision of MA 1974. Thus, limitation between Cambodia and Indonesia is exceedingly diverse. Cambodia would like to ensure that its laws are applied to all marriages which have Cambodian elements, while Indonesian regulations give options to couples for solemnization as long as it does not contradict MA 1974.

2.3 Lao PDR

A marriage with foreign elements in Lao PDR is stipulated in the Lao PDR's Family Law and Decree No. 198/PM issued by the Prime Minister regarding marriage between foreigners and Lao citizens which went into effect on December 19, 1994 and started to be enforced in late May 1995, hereinafter referred to as "**Decree No. 198/PM**".[928] This decree applies to all foreigners who marry Lao citizens. Any attempt to circumvent Lao governing marriage between foreigners and Lao citizens may result in deportation of the foreigners and denial of permission to re-enter Laos. In relation to marriage of a stateless person, Family Law No. 07/09/spa dated November 29, 1990 (hereinafter referred to as the "**Lao PDR's Family Law**") shall prevail. There is no provision on a marriage of two foreigners in Laos.

2.3.1 Capacity to marry

In general, the Lao PDR's Family Law applies to foreigners or aliens and stateless persons. It states that foreigners or aliens and stateless persons have the same rights and obligations as Lao citizens in matrimonial and family relationship. A marriage between a Lao citizen and foreigner, alien or stateless person and among foreigners, aliens and stateless persons within the territory of Lao PDR shall comply with the provisions of the Lao PDR's Marriage Law.[929]

A marriage between a Lao citizen and foreigner in Lao PDR must comply with the Lao PDR's Family Law and Decree No. 198/PM,[930] except in cases whereby the law and decree differ from an international treaty to which Lao PDR is a contracting party. In this case, the international treaty prevails.[931] For a Lao citizen who works in the sector

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[928] Decree of the Prime Minister No. 198/pm dated December 19, 1994. It is issued based on the Constitution of the Lao PDR, Family Law No. 07/09/spa dated November 29, 1990 and proposal of the Minister of Justice of Lao PDR. In relation to the enforcement date, please see "*Handout of Marriage Procedure in Laos*" by US Embassy in Vientiane, Laos in October 2010, available at https://la.usembassy.gov/u-s-citizen-services/child-family-matters/marriage-in-laos/, last accessed on March 3, 2018.

[929] See Art 47 par. (1) and (2) of the Lao PDR's Marriage Law. *"47. (Marriage between Lao Citizens and Foreign Individuals, Aliens, and Apatrids and among Foreign Individuals, Aliens and Apatrids in the Lao People's Democratic Republic) Foreign individuals, aliens and apatrids have the same rights and obligations as Lao citizens in matrimonial and family relationships.*

Marriage between Lao citizens and foreign individuals, aliens and apatrids, and among foreign individuals, aliens and apatrids in the Lao People's Democratic Republic shall comply with the provisions of this law even though the laws of the marriage solicitor's country may authorise marriage [under the conditions, such as] with a minor person or polygamy."

[930] Art. 9 of Decree No. 198/PM. *"9. For a marriage between a Lao citizen and a Lao expatriate (other citizenship than Lao), the rules are the rules of the family law and this decree."*

[931] Art. 3 of Decree 198/PM. *"The marriage between a Lao citizen and a foreigner in Lao PDR is to be conform the family law of the Lao PDR and this decree, except the case where the law and this decree differ with an international treaty of which Lao PDR is member. In that case the international treaty prevails."*

of national confidentiality, prior authorization should be given by the relevant organization.

A marriage between a Lao citizen and Lao expatriate (other nationality than Lao) who is a resident in Lao PDR is subject to the Lao PDR's Family Law and Decree No. 198/PM shall apply.[932] According to Lao PDR's Family Law, the provisions of minimum age and monogamy stated in the same shall be applied. These particular requirements are employed even though the law of the original state of such person allows him or her to marry a minor or polygamous marriage.[933]

In respect of marriage, the Lao PDR's Family Law and Decree No. 198/PM apply to its nationals and stateless persons in the Lao PDR's territory. The national laws still apply as implied in Art. 35 of the Lao PDR's Family Law in relation to foreigners and marriage solemnization between foreigners, aliens and stateless persons (see discussion below in Sub-chapter 6.2.3.2). It is worth to note that the requirements of age and monogamy supersede the provisions of national law of the foreigners. Both requirements still apply and supersede the national law. Thus, those requirements constitute mandatory rules for a marriage in Lao PDR.

2.3.2 Administrative Requirements of Marriage

A marriage in Lao PDR between a national and foreigner must be according to the Lao PDR's Family Law and Decree No. 198/PM. The registration of marriage among stateless persons within the territory of Lao PDR or marriage between a Lao PDR's citizen and foreign citizen or stateless person within the territory of Lao PDR takes place at a Lao Family Registrar Office.[934] Based on these regulations, Lao PDR's regulations apply to marriage solemnization in its territory. It is pursuant to the principle of *lex loci celebrationis.*

A marriage between a couple who are foreign individuals or aliens within the territory of Lao PDR may take place at the embassy or consulate of the respective country.[935]

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[932] Art. 9, 11 of Decree No. 198/PM. Please see the footnote above. *"11. For a marriage between a Lao citizen and an expatriate resident in Lao PDR, the family law of the Lao PDR prevails."*

[933] Art 47 par. (2) of the Lao PDR's Marriage Law. *"47. (Marriage between Lao Citizens and Foreign Individuals, Aliens, and Apatrids and among Foreign Individuals, Aliens and Apatrids in the Lao People's Democratic Republic) … Marriage between Lao citizens and foreign individuals, aliens and apatrids, and among foreign individuals, aliens and apatrids in the Lao People's Democratic Republic shall comply with the provisions of this law even though the laws of the marriage solicitor's country may authorise marriage [under the conditions, such as] with a minor person or polygamy. …"*

[934] Art. 47 par. (4) of the Lao PDR's Marriage Law. *"Registration of marriage between apatrids [shall] comply with this law. In the event that Lao citizens marry foreign individuals, aliens or apatrids, the marriage must be registered with a Lao family registrar officer."*

[935] Art 47 par. (3) of the Lao PDR's Marriage Law. *"Registration of marriage between foreign individuals, aliens, and apatrids in the Lao People's Democratic Republic may take place at the embassy or consulate of the concerned country.*

These provisions are acceptable, because the couple-to-be are not Lao PDR's nationals and the connection is merely the domicile of Lao PDR. Therefore, they have an option to solemnize their marriage in their Embassy.

2.3.3 Marriage outside Lao PDR

For a marriage between a Lao PDR national and foreigner outside the territory of Lao PDR, law of the relevant state prevails. However, an approval should be given by the Embassy or Consulate of the Lao PDR in that country. If there is no Embassy or Consulate, approval should be obtained from the Minister of Foreign Affairs.[936]

A marriage between Lao citizens which takes place abroad must be acknowledged by the Lao PDR´s Embassy or consulate. The Lao PDR's embassy shall acknowledge a marriage between Lao PDR's citizens if it finds that the regulation that applies to such marriage is in line with the Lao PDR's Marriage Law. Therefore, the state recognizes a marriage if it complies with the Lao PDR's Marriage Law.[937] In relation to marriage solemnization, Lao PDR applies the local law of the place where the marriage takes place. It is in line with the principle of *lex loci celebrationis*. However, acknowledgment of marriage from the government of Lao PDR that the marriage is in line with the Lao PDR's regulation is the requirement for marriage recognition.

Although the provisions above give a possibility to a couple to have marriage solemnization outside the territory of Lao PDR, such provisions exist side by side with Art. 5 of Sub-Decree No. 198. It requires a couple to be within the territory of Lao PDR for fulfilling marriage solemnization.

2.3.4 Comparison to Indonesia

2.3.4.1 Capacity to marry

Lao PDR determines that its national laws apply in determining the capacity to marry. In relation to foreigners and aliens, Lao PDR determines similarly that the national laws apply to determine the capacity to marry. The Lao PDR also stipulates that a marriage between a Lao citizen and foreign individual, alien, or stateless person and among

[936] Art. 10 of Decree 198/PM. *"10. For a marriage between a Lao citizen and a foreigner outside the territory of Lao PDR, the law of the related country prevails but an agreement should be given by the Embassy or Consulate of the Lao PDR in that country. If there is no Embassy nor Consulate the agreement should be obtained from the Ministry of Foreign Affairs. If there is no conflict with the law of the related country, the registration could be done at the Embassy or Consulate."*

[937] Art 49 of the Lao PDR's Marriage Law. "49. (Marriage between Lao Citizens Abroad) A marriage between Lao citizens abroad must be acknowledged by the Lao embassy or consulate. Marriage regulations between Lao citizens abroad shall comply with this law. The State recognises marriage between Lao citizens abroad when such marriage complies with this law."

foreign individuals, aliens and stateless persons within the territory of Lao PDR shall comply with the Lao PDR's Marriage Law.

There is no obstacle in determining the applicable law of stateless persons and persons of dual or multiple nationalities. Nationality affects nothing in determining the applicable law in this circumstance. As long as they are within the territory of Lao PDR, the Lao PDR's Family Law shall be the applicable law. The determining factor is the domicile, instead of nationality.

Lao PDR and Indonesia regulate similarly that the national laws of the two states regulate their nationals. The different is that the Lao PDR's Marriage Law applies to foreigners residing within Lao PDR's territory when they have an intention to marry. Indonesia regulates that MA 1974 applies to Indonesian nationals, while foreigners are still subject to their national laws. In addition, the Lao PDR's Family Law requires that minimum age and monogamy become mandatory rules to a couple-to-be. Therefore, it supersedes the national laws of foreigners, while MA 1974 states in general that a marriage must be in line with MA 1974 and is silent on such particular requirements.

In relation to stateless persons and persons of dual or multiple nationalities, Lao PDR and Indonesia regulate slightly similarly. The difference is that the Lao PDR's Marriage Law applies to them as they reside within the territory of Lao PDR. MA 1974 states nothing about stateless persons and persons of dual or multiple nationalities. Indonesian PIL scholars are of the opinion that domicile of the stateless persons concerned is the point of contact to determine the applicable law. Therefore, MA 1974 applies to the stateless persons concerned. MA 1974 is silent on dual or multiple nationalities and Indonesian scholars are of the opinion that the applicable law is determined according to the most effective nationality – instead of domicile or residence.[938]

Although Lao PDR applies domicile in particular cases (foreigners, aliens, and stateless persons) and Indonesia applies national laws to foreigners, *renvoi* is not possible. The Lao PDR's Family Law applies to foreigners and stateless persons who are within its territory. It will not apply to those who are abroad, because there is no connection with Lao PDR. The Lao PDR's Family Law applies to its nationals wherever they go. Indonesia regulates that foreigners are subject to their national law. Hypothetically, if a Lao PDR national would like to marry in Indonesia, both MA 1974 and Lao PDR's Family Law state similarly that the national law shall apply. If an Indonesian national would like to marry in Lao PDR, the Lao PDR's Family Law shall apply to him/her.

[938] See the discussion in Sub-chapter 3.2.6 regarding the Academic Bill of Indonesian PIL. See the opinion of Sudargo Gautama and Zulfa Djoko Basuki in particular.

Lao PDR and Indonesia regulate that solemnization of marriage within their territory must be according to their national law. Marriage solemnization outside their territory must be according to the local law of the country where the marriage takes place. It is in line with the general principle of PIL, namely *lex loci celebrationis.* The Sub-decree that requires a marriage of Lao PDR's national and foreigner to be within Lao PDR's territory makes the implementation of *lex loci celebrationis* to be impossible.

2.3.4.2 Solemnization and registration of marriage

In relation to marriage taking place abroad, both regulations state that recognition shall be made if the marriage is registered in the relevant embassy or representative office and does not contradict the national law. In relation to these provisions, Lao PDR and Indonesia are at the same position.

2.4 Malaysia

2.4.1 Capacity to marry

The Malaysian Laws apply the Principle of Domicile, thus its laws are applied to persons who have a domicile within the territory of Malaysia and permanent residents of Malaysia. They also apply to persons who reside abroad but still have their domicile of Malaysia. The domicile of Malaysia attaches to persons wherever they go, even abroad, as long as the persons have no intention to have a residency elsewhere.

The provision above can be seen in the Malaysian Islamic Family Law stipulating that it applies to all Muslims who live in the Federal territory and to all Muslim residents of the Federal Territory who live outside the Federal Territory.[939] The Malaysian Law Reform stipulates that it applies to all non-Moslems in Malaysia and to all persons domiciled in Malaysia but reside outside Malaysia. It applies also to natives who choose to marry under this Malaysian Law Reform or under Christian ordinance. Persons who are Malaysian citizens shall be deemed to be domiciled in Malaysia until a contrary condition is proven.[940]

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[939] Art. 4 of the Malaysian Islamic Family Law. *"4. (Application) Save as is the otherwise expressly provided, this Act shall apply to all Muslims living in the Federal Territory and to all Muslims resident in the Federal Territory who are living outside the Federal Territory."*

[940] Art. 3 of the Malaysian Law Reform. *"3. (Application) (1) except as is otherwise expressly provided this Act shall apply to all persons in Malaysia and to all persons domiciled in Malaysia but are resident outside Malaysia. (2) For the purposes of this Act, a person who is a citizen of Malaysia shall be deemed, until the contrary is proved, to be domiciled in Malaysia. (3) This Act shall not apply to a Muslim or to any person who is married under Islamic law and no marriage of one of the parties which professes the religion of Islam shall be solemnized or registered under this Act; but nothing herein shall be construed to prevent a court before which a petition for divorce has been made under section 51 from granting a decree of divorce on the petition of one party to a*

By those provisions, the Malaysian Islamic Family Law and Malaysian Law reform shall apply to persons who are domiciled within the territory of Malaysia, as the applicable law to determine the capacity to marry.

2.4.2 Administrative Requirements of Marriage

The solemnization of marriage for Malaysian Moslems shall be in accordance with provisions of the Malaysian Islamic Family Law. It means that a marriage shall be solemnized in the accordance with *Hukum Syarak*, namely solemnized by a *wali* in the presence of a Registrar, or a person appointed according to *Hukum Syarak*.[941]

According to the Malaysian Law Reform, the solemnization of marriage for non-Moslems must be made by a Registrar.[942]

2.4.3 Marriage outside Malaysia

In relation to the solemnization of marriage, Malaysia makes stipulation according to *lex loci celebrationis.* However, for Malaysian Moslems who live abroad, marriage solemnization must be according to *Hukum Syarak.*

The provisions above are described in Art. 24 of the Malaysian Islamic Family Law and Art. 26 of the Malaysian Law Reform. They state that a marriage of Malaysian Moslems abroad shall be solemnized in accordance with *Hukum Syarak* by an appointed Registrar at the Malaysian Embassy, High Commission or consulate in the country. Such solemnization can be made if the registrar is satisfied that one of the parties to the marriage is a Malaysian resident and each party has the capacity to marry according to *Hukum Syarak* and Malaysian Islamic Family Law. If either party is not a Malaysian resident, solemnization of the proposed marriage shall be considered valid in the place where the party is a resident.[943]

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marriage where the other party has converted to Islam, and such decree shall, notwithstanding any other written law to the contrary, be valid against the party to the marriage who has so converted to Islam. (4) this Act shall not apply to any native or Sabah or Sarawak or any aborigine Peninsular Malaysia whose marriage and divorce is governed by native customary law or aboriginal custom unless – (a) he elects to marry under his Act; (b) he contracted his marriage under the Christian Marriage Ordinance [Sabah Cap. 24]; or (c) he contracted his marriage under the Church and Civil Marriage Ordinance [Sarawak Cap. 92]."

[941] Art. 7 of the Malaysian Islamic Family Law. *"7. (Person by whom marriages may be solemnized) (1) A marriage in the Federal territory shall be in accordance with the provisions of this Act and shall be solemnized in accordance with Hukum Syarak by – (a) the* wali *in the presence of the Registrar; (b) the representative of the* wali *in the presence and with the permission of the Registrar; or (c) the Registrar as the representative of the* wali*. (2) Where a marriage involves a woman who has no* wali *from* nasab *in accordance with Hukum Syarak, the marriage shall be solemnized only by the* wali Raja*."*

[942] Art. 9 of the Malaysian Law Reform. *"9. (Person by whom marriages may be solemnized) A marriage under this Act may be solemnized only by a Registrar."*

[943] Art. 24 (1), (2) of the Malaysian Islamic Family Law. *"24. (Solemnization of marriages in Malaysian Embassies, etc., abroad.) (1) Subject to subsection (2), a marriage may be solemnized in accordance with* Hukum Syarak *by the Registrar appointed under subsection 28 (3) at the Malaysian embassy, High Commission, or*

The procedure above for solemnization and registration of marriage shall be similar in all respects to that applicable to other marriages according to the Malaysian Islamic Family Law as if the appointed registrar of a foreign country were a registrar in Malaysia.[944]

The marriage of every Moslem who resides in Malaysia and every person living abroad who is a resident of Malaysia shall be registered pursuant to the Malaysian Islamic Family Law.[945]

A marriage taking place abroad must be registered after the couple concerned returns to Malaysia. The registration shall be recognition of the marriage. In relation to legal effects of marriage registration, the Malaysian Islamic Family Law and Malaysian Law Reform stipulate that marriage registration shall not be construed to render valid or invalid a marriage that otherwise is invalid or valid, merely by reason of its registration or non-registration.[946]

If a person who is a resident of Malaysia has contracted a valid marriage according to *Hukum Syarak* abroad but does not register it as described above, the person shall appear before the nearest or most conveniently available Registrar of Muslim Marriages, Divorces and *Ruju'* abroad in order to register the marriage within six months after the date of marriage. Upon registration, such marriage shall be deemed to be registered under the Malaysian Islamic Family Law.[947]

Consulate in any country that has not notified the Government of Malaysia of its objection to solemnization of marriages at such Embassy, high Commission, or Consulate. (2) Before solemnizing a marriage under this section, the Registrar shall be satisfied – (a) that one or both of the parties to the marriage are resident of the Federal Territory; (b) that each party has the capacity to marry according to Hukum Syarak *and this Act; and (c) that, where either party is not a resident of the Federal Territory, the proposed marriage, if solemnized, will be regarded as valid in the place where that party is resident."*

[944] Art. 24 (3) of the Malaysian Islamic Family Law. *"24. (Solemnization of marriages in Malaysian Embassies, etc., abroad.) … (3) The procedure for solemnization and registration of a marriage under this section shall be similar in all respect to that applicable to other marriages solemnized and registered in the Federal Territory under this Act as if the registrar appointed for a foreign country were a registrar for the Federal Territory."*

[945] Art. 25 of the Malaysian Islamic Family Law. *"25. (Registration) The marriage after the appointed date of every person resident in the Federal Territory and of every person living abroad who is resident in the Federal Territory shall be registered in accordance with this Act."*

[946] Art. 34 of the Malaysian Islamic Family Law. *"34. (Legal effect of registration) Nothing in this Act or rules made under this Act shall be construed to render valid or invalid any marriage that otherwise is invalid or valid, merely by reason of its having been or not having been registered." Art 34 of the Malaysian Law Reform (Legal effect of registration) Nothing in this Act or rules made under this Act shall be construed to render valid or invalid any marriage that otherwise is invalid or valid, merely by reason of its having been or not having been registered."*

[947] Art. 31 (1), (2) of the Malaysian Islamic Family Law. *"31. (Registration of foreign marriage of a person resident in the Federal Territory) (1) Where any person who is a resident of the Federal Territory has contracted a valid marriage according to* Hukum Syarak *abroad, not being a marriage registered under section 24, the person shall, within six months after the date of the marriage, appear before the nearest or moth conveniently available Registrar of Muslim Marriages, Divorces, and Ruju' abroad in order to register the marriage, and the marriage,*

If before the expiry of six months, the couple or one of them returns to Malaysia and the marriage has not been registered abroad, the registration of marriage shall be effected within six months as of the first arrival in Malaysia, either by one or both of the couple. The registrar may dispense with the appearance of one of the parties to the marriage. If he/she is satisfied with the reason of such absence, he/she shall include a statement of the reason for absence in the Marriage Register. Upon the registration of marriage, a certified copy shall be issued and delivered to the couple concerned. If the period of six months lapses and the couple have not registered their marriage, the marriage can still be registered upon application to the registrar after paying a penalty as stipulated by regulations.[948]

The Malaysian Law Reform also stipulates the same as the Malaysian Islamic Family Law in relation to a marriage which takes place abroad, even though the period is slightly different. The Malaysian Law Reform stipulates that the period is only twenty-one days and not more than three months, while the Malaysian Islamic Family Law mentions six

upon being registered, shall be deemed to be registered under this Act. (2) Where, before the expiry of the period of six months, the return of either or both parties to the Federal Territory is contemplated and the marriage has not been registered abroad, registration of the marriage shall be effected within six months of the first arrival of either or both of the parties in the Federal Territory by the party or both parties appearing before any Registrar in the Federal Territory and – (a) producing to the Registrar the certificate of marriage or such evidence, either oral or documentary, as may satisfy the Registrar that the marriage did take place; (b) furnishing such particulars as may be required by the Registrar for the due registration of the marriage; and (c) applying in the prescribed form for the registration of the marriage and subscribing the declaration therein."

[948] Art. 31 (3), (4), (5) of the Malaysian Islamic Family Law. *"31. (Registration of foreign marriage of a person resident in the Federal Territory) … (3) The Registrar may dispense with the appearance of one of the parties if he is satisfied that there exists good and sufficient reason for the absence of the party and in that case the entry in the Marriage Register shall include a statement of the reason for the absence. (4) Upon registration of a marriage under this section, a certified copy of the entry in the Marriage Register signed by the Registrar shall be delivered or sent to the husband and another copy to the wife, and another copy shall be sent, within such period as may be prescribed, to the Chief Registrar who shall cause all such certified copies to be bound together to constitute the Foreign Muslim Marriages Register. (5) Where the parties to a marriage required to be registered under this section have not appeared before a Registrar within the period specified in subsection (1), the marriage may, upon application to the Registrar, be registered later on payment of such penalty as may be prescribed."*

months.[949] Obligations and legal effects of the registration are similar to the Malaysian Islamic Family Law.[950]

2.4.4 Comparison to Indonesia

2.4.4.1 Capacity to marry

In determining the capacity of a person to marry, Malaysia stipulates that Malaysian regulations apply to the person who is domiciled within the territory of Malaysia or domiciled in Malaysia but residing outside the territory of Malaysia. Malaysian nationals are deemed to have their domicile in Malaysia, as long as not proven otherwise.

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[949] Art. 26, 27 of the Malaysian Law Reform. *"26. (Solemnization of marriages in Malaysian Embassies, etc., abroad.) (1) A marriage may be solemnized by the Registrar appointed under subsection 28 (4) at the Malaysian Embassy, High Commission, or Consulate in any country which has not notified the Government of Malaysia of its objection to solemnization of marriages at such Embassy, high Commission, or Consulate: Provided that the Registrar shall be satisfied – (a) that one or both of the parties to the marriage is a citizen of Malaysia; (b) that each party has the capacity to marry according to this Act; and (c) that, where either party is not domiciled in Malaysia, the proposed marriage, if solemnized, will be regarded as valid in the place where that party is domiciled; and (d) that notice of the proposed marriage has been given at least twenty-one days and not more three months previously, which notice has been published both at the office of the Registrar in the Embassy, High Commission or Consulate where the marriage is to be solemnized and at the Registry of the marriage district in Malaysia where each party to the marriage was last ordinarily resident and no caveat or notice of objection has been received. (2) The procedure for solemnization and registration of marriages at a Malaysian embassy, High Commission or Consulate shall be similar in all respects to that which applicable to marriages solemnized and registered in Malaysia under this Act as if the Registrar appointed for a foreign country were a Registrar in Malaysia. (3) A marriage solemnized under this section shall, for the purposes of this Act, be deemed to be a marriage solemnized in Malaysia, and subsection 7(2) shall apply mutatis mutandis in relation to any offence under this Act, in respect of such marriage."*

[950] Art. 27, 31 and 34 of the Malaysian Law Reform. *"27. (Registration) The marriage of every person ordinarily resident in Malaysia and of every person resident abroad who is a citizen of or domiciled in Malaysia after the appointed date shall be registered pursuant to this Act. 31. (Registration of foreign marriage of a person resident in the Federal Territory) (1) Where any person who is a citizen of domiciled in Malaysia has contracted a valid marriage abroad, not being a marriage registered under section 26, the person shall- (a) within six months after the date of the marriage, appear before the nearest or moth conveniently available Registrar abroad; and (b) register such marriage. (1A) Where, before the expiry of six months under paragraph (1) (a), either or both parties return to Malaysia and the marriage was not registered such person shall – (a) within six months of the first arrival in Malaysia, appear before any Registrar; and register such marriage. (1B) A person who applies to register a marriage under subsection (1) or (1A) shall – (a) produce to such Registrar the certificate of such marriage or such evidence, either oral or documentary as may satisfy the Registrar that the marriage took place; (b) furnish such particulars as may be required by the Registrar for the due registration of the marriage; and (c) apply in the prescribed form for the registration of the marriage to be effected and subscribe the declaration therein. (2) The Registrar may dispense with the appearance of one of the parties if he is satisfied that there exists good and sufficient reason for the absence of the party and in such case the entry in the Marriage Register shall include a statement of the reason for the absence. (3) Upon the registration of any marriage under this section, the Registrar shall deliver the triplicate copy to the register to the parties to the marriage and the original to the Marriage Register and the duplicate to the Superintendent Registrar who shall cause such copies to be bound together to constitute the Foreign Marriages Register. (4) Where the parties to a marriage required to be registered under this section have not appeared before a Registrar within the period as prescribed in subsection (1), the marriage may, upon application to the Registrar, be registered by him on payment of such penalty as may be prescribed. "*

This reflects application of the Principle of Domicile. The application of Malaysian laws to its nationals and permanent residents are similar to nationality.

There is no obstacle in determining the applicable law of stateless persons and persons of dual or multiple nationalities. Nationality does not determine the applicable law in this circumstance. As long as they are domiciled within the territory of Malaysia, Malaysian law shall be the applicable law. The determining factor is the domicile, instead of nationality.

It is different from Indonesia, as Indonesia applies the Principle of Nationality to the applicable law, in this case, to determine the capacity to marry of a person. Due to the similarity of attachment of Indonesian law to its nationals and Malaysian law to its nationals and permanent residents, contact between a Malaysian and Indonesian in case of private international law shall not result in any *renvoi*.

2.4.4.2 Solemnization and registration of marriage

Malaysia stipulates that marriage solemnization of Moslem residents must be according to the Malaysian Islamic Family Law and shall be solemnized in accordance with *Hukum Syarak*. For a non-Moslem couple, it must be according to the Malaysian Law Reform. A Moslem couple who are abroad may have their marriage solemnized in its embassy or representative office in which *Hukum Syarak* and Malaysian Islamic Family Law shall apply. It is reasonable as the territory of Malaysian embassy is an extended territory. Therefore, the applicable law shall be Malaysian law.

A couple may also register their marriage in the same registration office for a Moslem couple at the place where the marriage takes place. Upon registration, such marriage shall be deemed registered under the Malaysian Islamic Family Law. The registration shall follow when they return to Malaysia. If either party is not a Malaysian resident, solemnization of the proposed marriage shall be regarded valid in the place where the party is a resident. The provisions articulated above reflect the principle of *lex loci celebrationis*.

In relation to the solemnization of marriage, MA 1974 stipulates almost the same as the above. It applies the principle of *lex loci celebrationis*. Indonesia considers that a marriage is valid if it is legally solemnized according to the local law of the country where it is held. However, Indonesia gives limitation, namely as long as such marriage does not contradict the provisions of MA 1974.

2.5 Myanmar

2.5.1 Capacity to marry

The common law uses the concept of "domicile" for a significant part of the case of status. In relation to marriage, the capacity to marry is determined by domiciliary law.[951] This law will apply its rules on age or marital capacity, closeness of relationship which is a bar to marriage, ability to enter into a polygamous marriage and question of consent.[952]

In relation to domicile, Myanmar stipulates in its succession regulations that a person can only have one domicile at any given time. The original domicile shall be the domicile of one's father (or of the child's mother, if the child is born out of wedlock or after the father's death) at the date of one's birth. This domicile prevails until a new domicile is acquired by taking up a permanent resident or fixed habitation in a country which is not the original domicile. This domicile continues until the former domicile is resumed or another one is acquired. A married woman acquires the domicile of her husband if she does not have any domicile before a marriage. Her domicile follows that of her husband.[953]

2.5.2 Administrative Requirements of Marriage

MM 2015 and MBWS Marriage Law 2015 do not mention about solemnization which can be done in a marriage if one of the couples is a foreigner. As long as the foreigner is living in Myanmar, his/her marriage shall be subject to Myanmar law. Solemnization shall be according to the religious law. This reflects the adoption of *lex loci celebrationis*, as the marriage shall be according to the local law of the country where the marriage takes place.[954]

2.5.3 Comparison to Indonesia

In relation to the capacity to marry, Myanmar applies the domicile law to determine the capacity to marry. Based on the domicile regulated in its succession law, Myanmar adopts the domicile, but its attachment is similar to nationality. It is the opposite to Indonesia. In relation to marriage solemnization, Myanmar and Indonesia adopt the principle of *lex loci celebrationis,* as the local law of the country where the marriage takes place shall apply.

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[951] Adrian Briggs, *Op.Cit.*, pp. 150-151.
[952] *Ibid.* It also determines the capacity of a person to marry another of the same sex.
[953] Part II (Art. 6-10, 13-16) of the Succession Act 1930. See also *Ibid,* p. 150.
[954] Adrian Briggs, *Op.Cit.,* p. 150.

In relation to marriage recognition, due to lack of information, it is appropriate to admit that the comparison to MA 1974 is not feasible. However, the public policy plays a role to affect the recognition of marriage. In some systems of law, a person may marry at a very young age, may marry a close relative, or may be forced to marry without any consent. In such cases, a law may consider that its own public policy will be offended by regarding the marriage valid or invalid.[955]

2.6 The Philippines

2.6.1 Capacity to marry

The Philippine Family Code applies the Principle of Nationality, thus the national law of a person shall be the applicable law to determine the capacity to marry.[956] It is also reflected when it provides for a foreign national, if either or both parties to a marriage are citizens of a foreign country. It shall be necessary for them, before a marriage license can be obtained, to submit a certificate of legal capacity to contract a marriage issued by their respective diplomatic or consular official.[957]

In relation to dual or multiple nationalities, scholarly writings suggest the application of effective nationality.[958] Stateless persons and refugees, in lieu of the required certificate of legal capacity, are required to submit an affidavit stating the circumstances showing such capacity to contract a marriage.[959]

2.6.2 Administrative Requirements of Marriage

A marriage between a Philippine citizen and foreign citizen within the territory of the Philippines shall be solemnized according to the Philippine law.[960] In line with such

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[955] *Ibid,* p. 150

[956] Art. 15 of the Philippine Civil Code No. 386 regarding An Act to Ordain and Institute the Civil Code of the Philippines. *"Law relating to family rights and duties, or to the status, condition and legal capacity of persons are binding upon citizens of the Philippines, even though living abroad."* See also Jorge R. Coquia, *A Restatement of Conflict of Law (Private International Law) For Philippines,* Philippine Law Journal, Vol. 67 Second Quarter, 1992, p. 126. See also Bueb, *Philippinen*, Ausländisches Familienrecht Rn. 39, 2017.

[957] Art. 21 par (1) of the Philippine Family Code. *"21. When either or both of the contracting parties are citizens of a foreign country, it shall be necessary for them before a marriage license can be obtained, to submit a certificate of legal capacity to contract marriage, issued by their respective diplomatic or consular officials."*

[958] Jorge R. Coquia, *Op.Cit.,* pp. 127-128.

[959] Art. 21 par (2) of the Philippine Family Code. *"21. … stateless persons or refugees from other countries shall, in lieu of the certificate of legal capacity therein required, submit an affidavit stating the circumstances showing such capacity to contract marriage."*

[960] Art. 26 of the Philippine Family Code. *"26. All marriages solemnized outside the Philippines, in accordance with the laws in force in the country where they were solemnized, and valid there as such, shall also be valid in this country, except those prohibited under Article 35 (1), (4), (5) and (6), 36,37 and 38. Where a marriage between a Filipino citizen and a foreigner is validly celebrated and a divorce is thereafter validly*

principle, all marriages solemnized outside the Philippines shall be in accordance with the laws in force in the country where they are solemnized.

2.6.3 Marriage outside the Philippines

All marriages solemnized outside the territory of the Philippines between a Philippine national and foreign national or between Philippine nationals must be in accordance with the laws in force in the country where they are solemnized.

Another option is available for Philippine nationals who would like to marry in the representative office of the Philippines. The Philippine Family Code states that a marriage between Philippine nationals may be solemnized by a consul-general, consul or vice-consul of the Republic of Philippines. The said consular officer has authority to issue a marriage license and solemnize with regard to marriage celebration.[961]

Marriage recognition must consider the provisions of Art. 26 para (2) of the Philippine Family Code.[962] It states that the Philippines shall recognize a marriage that takes place abroad provided that the marriage is according to the local law and it is valid in the Philippines, except for marriages prohibited under Art. 35 (1), (4), (5), (6), Art. 36-38 of the Philippine Family Code which provide for the capacity to marry.[963]

Therefore, in case that a couple are under 18 years old or consent is not free from pressure or it is not a monogamous marriage, a marriage shall be considered void from the beginning. The capacity to marry also covers mental health or psychological

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obtained abroad by the alien spouse capacitating him or her to remarry, the Filipino spouse shall have capacity to remarry under Philippine law."

[961] Art. 10 of the Philippine Family Law. *"10. Marriages between Filipino citizens abroad may be solemnized by a consul-general, consul or vice-consul of the Republic of the Philippines. The issuance of the marriage license and the duties of the local civil registrar and of the solemnizing officer with regard to the celebration of marriage shall be performed by said consular official."*

[962] Jorge R. Coquia, *Loc. Cit.,* p. 129.

[963] *Ibid*. Art. 35 (1), (4)-(6), 36, 37 and 38 of the Philippine Family Code. *"35. The following marriages shall be void from the beginning: (1) Those contracted by and any party below eighteen years of age even with the consent of parents or guardians; … (4) Those bigamous or polygamous marriage not failing under Article 41; (5) Those contracted through mistake of one contracting party as to the identity or the other; and (6) Those subsequent marriages that are void under Article 53." "36. A marriage contracted by any party who, at the time of the celebration, was psychologically incapacitated to comply with the essential marital obligation of marriage, shall likewise be void even if such incapacity becomes manifest only after its solemnization." "37. Marriages between the following are incestuous and void from the beginning, whether relationship between the parties be legitimate or illegitimate: (1) between ascendants and descendants of any degree; and (2) Between brothers and sisters, whether if the full or half blood." "38. The following marriages shall be void from the beginning for reasons of public policy: (1) Between collateral blood relatives whether legitimate or illegitimate, up to the fourth civil degree; (2) Between step-parents and step-children; (3) Between parents-in-law and children-in-law; (4) Between the adopting aren't and the adopted child; (5) Between the surviving spouse of the adopting parent and the adopted child; (6) Between the surviving spouse of the adopted child and the adopter; (7) Between an adopted child and a legitimate child of the adopter; (8) Between adopted children of the same adopter; and (9) Between parties where one, with the intention to marry the other, killed that other person's spouse, or his or her own spouse."* See also Jorge R. Coquia, *Loc. Cit.*, p. 129.

condition that enable him or her to comply with essential marital obligations as husband or wife. In addition to the above, the original or existing family relationship between the couple-to-be must be taken into account. A couple must not have any family relationship legally or illegally, half or full-blood, for instance, parents and children, brothers and sisters. It is worth to note that a marriage abroad must also considers Art. 38 if the couple would like to have recognition from the Philippine government. Art. 38 states clearly that those prohibitions are for the reason of public policy. It makes contradiction to such provisions shall result in the annulment of marriage from the beginning.

2.6.4 Comparison to Indonesia

2.6.4.1 Capacity to marry

The Philippines and Indonesia, in determining the capacity to marry of a person, apply the same principle, namely the Principle of Nationality. Due to such similarity, the application of *renvoi* is impossible.

In relation to stateless persons, the Philippines and Indonesia regulate slightly differently. The Philippines states that the stateless persons concerned must submit an affidavit stating the circumstances showing their capacity to enter into a marriage. Indonesia considers that the domicile of the stateless person concerned is the point of contact to determine the applicable law. Therefore, MA 1974 is applied to the stateless person. The Philippine Family Code is silent on dual or multiple nationalities. Indonesia is also in such position, as MA 1974 is silent on the matter. However, Indonesian scholars are of the opinion that the applicable law shall be determined according to the most effective nationality – instead of domicile or residence.[964]

In relation to permanent residents, both states are silent. The provisions above show that the Philippines and Indonesia use the Principle of Nationality as the main rule to determine the applicable law.

2.6.4.2 Solemnization and registration of marriage

In relation to solemnization, the Philippines stipulates similarly that the applicable law is the law of the country where a marriage takes place. The Philippines and Indonesia shall recognize that a marriage takes place abroad provided that the marriage complies with the substantive marital requirements of the original country.

[964] See discussion of the opinion of Indonesian scholars in Sub-chapter 3.6 regarding the Academic Bill of Indonesian PIL, in particular the opinion of Sudargo Gautama and Zulfa Djoko Basuki.

The Philippine Family Code is silent about marriage registration or marriage solemnization in a Philippine embassy or representative office, while Indonesian regulations allow it.

Having considered the provisions on marriage solemnization outside their territory as stated above, the Philippines and Indonesia provide similar provisions, namely both shall consider that a marriage taking place abroad is valid if it is according to the local law of the country where the marriage is solemnized. However, it also gives limitation that a marriage between their national and foreigner within their territory or abroad may not contradict their marriage law, particularly substantive requirements. However, slightly different from Indonesia, the Philippines states that prohibition of family relation between the couple-to-be are the reason of public policy.

2.7 Singapore

2.7.1 Capacity to marry

In case that either party is a citizen of or is domiciled in Singapore, both parties have the capacity to marry under the Women's Charter.[965] Prescription of the Women's Charter of the capacity to marry should only apply where the parties are most closely connected with Singapore, i.e. where either party is a citizen of Singapore or is domiciled in Singapore until proven otherwise.[966] Pursuant to the Women's Charter, a person who is a citizen of Singapore shall be deemed, until proven otherwise, to be domiciled in Singapore.

If a person who has the intention to marry has a dual domicile, the person should possess the capacity to marry as prescribed by her domicile at the point in time just before the solemnization of marriage.[967] This domicile is her antenuptial domicile. The Colony of Singapore's Court of Appeal in *Re Maria Huberdina Hertogh; Inche Mansor Abadi v Adrianus Petrus Hertogh.* approved of a decision stating that whether or not Maria Hertogh possessed the capacity to marry Mansor Abadi by having reached the minimum

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[965] Sec. 183 (2) (b) of the Women's Charter. *"183. (Recognition of marriages contracted in Embassies, etc., in Singapore) … (2) A marriage contracted in any foreign Embassy, or Consulate in Singapore shall be recognised as valid for all purposes of the law of Singapore if all the following requirements are satisfied: (a) it was contracted in the form required or permitted by the law of the country whose Embassy, High Commission or Consulate it is, or in a form permitted under this Act; (b) each of the parties had, at the time of the marriage, capacity to marry under the law of the country of his or her domicile or under the law of the country of the intended domicile of the parties after marriage; and (c) in the case where either of the parties is a citizen of or is domiciled in Singapore, both parties had capacity to marry under this Act."* See also Leong Wai Kum., *Op.Cit.*, pp. 15.

[966] Sec. 3(5) of the Women's Charter. *"3. (Application) … (5) For the purpose of this Act, a person who is a citizen of Singapore shall be deemed, until the contrary is proved, to be domiciled in Singapore."*

[967] Leong Wai Kum., *Op.Cit.*, pp. 18.

age of marriage is determined by reference to the prescription in her antenuptial domicile, which was determined to be the Netherlands.[968]

There is a newer choice of law rule that can serve as an alternative to the classic "dual domicile rule" if the application of the classic rule will result in an invalid marriage for lack of the capacity to marry. The alternative is the domicile of "intended matrimonial home rule". It allows a court to choose to test a party's capacity to marry to the other, not by the antenuptial domicile if this will invalidate the marriage, but by the law of the place where the parties intend to set up their matrimonial home. This rule requires the court to find out that the parties have formed their intention to set up a matrimonial home in a particular jurisdiction by the time of their marriage.

In summary, the choice of law rule developed by the courts (that determines the scope of application of prescription of the Women's Charter of the capacity to marry) are: the classic "dual domicile rule" or "intended matrimonial home rule" and if the question of validity of a non-Muslim marriage formed in Singapore arises before a court in Singapore, all prescriptions of the Women's Charter of the formation of marriage including the capacity to marry are fulfilled, i.e. "law of the forum" rule.[969] In relation to the scope of application, it can be read that the Women's Charter applies to a person who at the time of marriage, is domiciled in Singapore or a person who has formed the common intention with her intended spouse to set up a matrimonial home in Singapore and a person who chooses to marry in Singapore (at least where the validity of his/her marriage arises before a court in Singapore).

Singaporean residents must comply wherever they choose to marry unless they have formed the common intention to delink themselves from regulations of the marriage law in Singapore by intending to set up a matrimonial home in another legal system. Non-residents are bound by them if they form the common intention to set up a matrimonial home in Singapore. Non-residents who choose to marry in Singapore can also be bound by them as the validity of marriage arises before a court in Singapore.[970]

2.7.2 Administrative Requirements of Marriage

Solemnization of marriage within Singapore shall be according to the Women's Charter. It is stated that every marriage in Singapore, including a couple consisting of a Singaporean citizen and foreign citizen, shall be void unless it is solemnized on the authority of a valid marriage license issued by a Registrar or a valid special marriage license granted by the Minister and by a registrar or person who has been granted a

[968] *Ibid.*, pp. 18-21.
[969] *Ibid.*, pp. 23.
[970] *Ibid.*, pp. 27.

license to solemnize marriages. Solemnization must be in the presence of two credible witnesses.[971]

2.7.3 Marriage outside Singapore

The Women's Charter allows solemnization of marriage within foreign embassies, high commissions or consulates in Singapore.[972]

Such marriage shall be considered valid for all purposes of the law of Singapore, if the following requirements have been met. First, marriage solemnization is in a form required or permitted by the law of the country or in the form permitted under the Women's Charter. Second, in relation to the capacity to marry, it states that each party (at the time of marriage) has the capacity to marry under the law of: (a) the country of his or her domicile or (b) under the law of the country of the intended domicile of the parties after the marriage. In case either party is a citizen of or is domiciled in Singapore, both parties have the capacity to marry pursuant to the Women's Charter.[973] In relation to the latter requirement, the Women's Charter applies as if it is inherent as nationality.

A Singaporean Registrar is empowered by the Women's Charter to register all marriages, unless he/she is satisfied that a marriage is void under the Women's Charter. A Singaporean resident who has no capacity to marry a close relative may not go abroad to marry even if he/she can find a country the law of which allows him/her to do so and subsequently, hopes to return to Singapore and register his/her marriage. The parties do not have any valid marriage for the purpose of law in Singapore and the marriage will not be recognized and registered in Singapore. In the event of dispute, validity of this marriage will be decided by a court.[974]

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[971] Sec. 22 (1), (2) of the Women´s Charter. "22 *(Requirement for valid marriage) (1) Every marriage solemnized in Singapore shall be void unless it is solemnized – (a) on the authority of a valid marriage licence issued by the Registrar or a valid special marriage licence granted by the Minister; and (2) by the Registrar or a person who has been granted a licence to solemnize marriages. (2) Every marriage shall be solemnized in the presence of at least 2 credible witnesses."*

[972] Sec. 183 of the Women's Charter. *"183. (Recognition of marriages contracted in Embassies, etc., in Singapore) (1) Nothing in this Act shall prevent the solemnization in Singapore of a marriage in any foreign Embassy, High Commission or Consulate in Singapore. (2) A marriage contracted in any foreign Embassy, or Consulate in Singapore shall be recognised as valid for all purposes of the law of Singapore if all the following requirements are satisfied: (a) it was contracted in the form required or permitted by the law of the country whose Embassy, High Commission or Consulate it is, or in a form permitted under this Act; (b) each of the parties had, at the time of the marriage, capacity to marry under the law of the country of his or her domicile or under the law of the country of the intended domicile of the parties after marriage; and (c) in the case where either of the parties is a citizen of or is domiciled in Singapore, both parties had capacity to marry under this Act."*

[973] Sec. 183 of the Women's Charter. Please see footnote above.

[974] Leong Wai Kum, *Op.Cit.*, pp. 16-17.

2.7.4 Comparison to Indonesia

2.7.4.1 Capacity to marry

The Woman's Charter stipulates that in determining the capacity to marry, the applicable law shall be the domicile law. It provides two alternatives. First, the applicable law shall be the domicile law of either or both of the couple. The Women's Charter further stipulates that the domicile can be the existing domicile or the current domicile of the couple or one of the couples. Another possibility is the law of domicile where the couple have an intention to reside or domicile after the marriage. This reflects the Principle of Domicile. In addition, the Women's Charter applies to Singapore nationals and the capacity to marry in a marriage.

This application of the Women's Charter is different from Indonesia which applies the Principle of Nationality. This position makes *renvoi* possible to be applied to a Singaporean citizen who resides within the territory of Indonesia and would like to marry. Indonesia can apply MA 1974 in determining his or her capacity to marry. However, MA 1974 cannot be applied if the couple has an intention to have another domicile after the marriage.

2.7.4.2 Solemnization and registration of marriage

In relation to marriage solemnization, the Women's Charter stipulates that the applicable law is the law of a country where the marriage takes place. This stipulation is similar to MA 1974. Both of them apply the principle of *locus rigit actum* or *lex loci celebrationis*.

A marriage within any foreign embassy or representative office in Singapore is allowed, provided that it is according to certain requirements. One of them it is in line with the Women's Charter. Indonesia has no provision comparable to this. Indonesian marriage law in contrary allows a marriage of Indonesian nationals abroad in Indonesian embassy or representative office.

The Women's Charter and MA 1974 stipulate that they will recognize a marriage between a foreigner and their national which takes place abroad or marriage in an embassy or representative office provided that the marriage complies with the substantive marital requirements of the national law as relevant. These provisions indicate that the solemnization of marriage must be according to the relevant law.

2.8 Thailand

Thailand has a separate codification of conflict law in the Act of Conflict of Laws, herein referred to as the "Thailand Conflict of Laws Act".[975] This act provides provisions on a marriage between a Thailand citizen and foreign citizen and its solemnization within or outside the territory of Thailand.[976]

2.8.1 Capacity to marry

It is stipulated that the capacity to enter into a betrothal or termination of the same shall be governed by the law of the nationality of each party.[977] In relation to the effect or termination of betrothal, the law of the judge who adjudicate the case shall govern the case.[978] The law of nationality of each party is also applied in determining the capacity or condition to enter into a marriage. For a person has two or more nationalities acquired successively, law of the last acquired nationality shall govern. If a person has two or more nationalities simultaneously, the law of a country where the person has his domicile shall govern. If such person has his domicile in a country other than any such countries, the law of his domicile at the time of the institution of action shall govern; if the domicile of such person is unknown, the law of the country where he has his residence shall govern. If there is contradiction to the Thailand law, the Thailand law shall govern.[979]

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[975] This act is referred to as the "Act of Conflict of Laws, B.E.2481", according to Art. 1 of the same. The act was promulgated on March 10, 1938. This Act contains 42 articles divided by six sections, namely: general provisions, status and capacity of persons, obligations, properties and things, family and succession. In relation to this sub-chapter, the elaboration of this Act on Conflict of Laws shall be only to marriage and the relevant matters.

[976] Klose, *Thailand*, Ausländisches Familienrecht Rn. 35, 2017, pp. 35-41. See also *Encyclopedia of Private International Law*, (ed.) Jürgen Basedow, Giesel Rühl, Franco Ferrari, Pedro De Miguel Asensio, (Cheltenham: Edward Elgar Publishing Limited, 2017), pp. ***

[977] Betrothal is an engagement period which starts when a groom gives a property to a woman as the evidence that the betrothal takes place. The property gift is known as *Khongman.* However, the law does not require every marriage to be started with a betrothal. See the discussion of Betrothal in Sub-chapter 5.1.8.2 regarding Betrothal.

[978] Art. 18 of the Thailand Conflict of Laws Act. *"Art. 18. The competence to conduct or cancel an engagement shall be in accordance with the law governing the nationality of each party. The effects of such engagement shall be subject to the law of the state to which the court addressing the relevant case belongs.*

19. The condition on engagement shall be in accordance with the law governing the nationality of each party."

[979] Art. 6 of the Thailand Conflict of Laws Act. *"6. Whenever the law of nationality is to govern, and a person has two or more nationalities acquired successively, the law of nationality last acquired shall govern. Whenever the law of nationality is to govern , and a person has two or more nationalities acquired simultaneously, the law of nationality of the country where such person has his domicile shall govern; if such person has his domicile in a country other than any such country, the law of his domicile at the time of the institution of action shall govern; if the domicile of such person is unknown, the law of the country where he has his residence shall govern. In any cases of conflict as regards the nationality of a person, where one of the nationalities is Thai, which shall govern, is the law of Siam."*

In relation to this capacity, a foreign national must provide certain paperwork to prove that he/she is single and meets the requirement of capacity to marry pursuant to the law of his country.

2.8.2 Administrative Requirements of Marriage

A marriage shall be valid if it is solemnized according to the law of a country where the marriage takes place. Therefore, a marriage between Thailand citizens or between a Thailand citizen and foreign citizen solemnized within the territory of Thailand shall be according to its law.[980]

Marriage cancellation shall subject to the law prescribing the conditions of such marriage. However, cancellation on the ground of mistake, deceit or threat shall be according to the local law of a country where the marriage takes place.[981] In general, the Thailand Conflict of Law provides limitation. It is stated that the limitation in general can be found in the provisions of Art. 5 of the Thailand Conflict of Laws.

2.8.3 Marriage outside Thailand

Thailand law makes a distinction between a marriage between foreign subjects and marriage between Siamese or Thailand subjects. The Thailand Conflict of Laws Act mentions that a marriage in accordance with the form prescribed by the law of the country where such marriage takes place shall be valid. While a marriage between Siamese subjects or between a Siamese subject and foreign national taking place in a foreign territory shall be valid only it is in accordance with the form prescribed by the Siamese law.[982]

The Thailand Civil Code also states about a marriage taking place abroad between Thailand nationals or a Thailand national and foreign national. It is silent on a marriage of foreigners solemnized abroad. It states that a marriage is valid if such marriage is according to the Thai law or by the law of the country where it takes place. In the latter law, the applicable law of solemnization is stated slightly different. It must be according to the Thai law or local law. The word "or" in the respective article implies an alternative for marriage solemnization. According to the author, the provision above implies the recognition of marriage.

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[980] Art. 20 of the Thailand Conflict of Laws Act. *"20. A marriage in accordance with the form prescribed by the law of the country where such marriage take place shall be valid. A marriage between Siamese subjects or between a Siamese subject and a foreign citizen, taken place in foreign territory in accordance with the form prescribed by the Siamese law shall be valid."*

[981] Art. 28 of the Thailand Conflict of Laws Act. "The cancellation of marriage shall be subject to the law prescribing the condition of such marriage. But mistake, deceit, or threat which may become the ground of cancellation shall be in accordance with the law of the place where the marriage takes place."

[982] Art. 20 of the Thailand Conflict of Laws Act.

Marriage registration in a Thailand Diplomatic or Consular Office is an alternative. It is not compulsory, as described in Art. 1459 of the Thailand Civil Code. It states that if a spouse desires to have a marriage registered according to the Thailand law, the registration shall be effected by a Thailand Diplomatic or Consular Office.[983]

Cancellation of marriage shall be according to the law which prescribed the conditions of such marriage. However, any mistake, deceit or threat which becomes a ground for cancellation shall be in accordance with the law of a country where the marriage takes place.[984] A foreign law for this particular circumstance can be applied, provided that it does not contradict Thailand public order or good morals.[985]

2.8.4 Comparison to Indonesia

2.8.4.1 Capacity to marry

Indonesia and Thailand apply the same principle in determining the capability to marry of a person, namely the Principle of Nationality. The law of a country where a person becomes a citizen shall be the applicable law. This similarity between the states leaves no room for the application of *renvoi.*

With respect to dual or multiple nationalities, the Thailand Conflict of Law Act stipulates that the applicable law shall be the domicile law of the person concerned. The Thailand Conflict of Laws details the domicile law of the person. If there is contradiction with regard to nationality and one of those laws is Thailand national law, the Thailand national law shall govern. Considering the above, the Thailand Conflict of Laws stipulates more details than Indonesia. With respect to stateless persons, Indonesia considers similarly that the domicile of the persons concerned is the point of contact to determine the applicable law. However, in relation to dual or multiple nationalities, the applicable law shall be determined according to the most effective nationality – instead of domicile or residence.

In relation to permanent residents, both states are silent. The provisions above show that Thailand and Indonesia use the Principle of Nationality as the main rule to determine the applicable law.

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[983] *Ibid*. Art. 1459 of the Thailand Civil Code. *"1459. A marriage in foreign country between Thai people and a foreigner may be effected according to the form prescribed by Thai law or by the law of the country where it takes place. If the spouses desire to have the marriage registered to Thai law, the registration shall be effected by a Thai Diplomatic or Consular officer."*

[984] Art. 28 of the Thailand Conflict of Laws Act. *"28. The cancellation of marriage shall be governed by the law, which governs the conditions of marriage. However, mistake, fraud, or duress as causes for cancellation of marriage shall be governed by the law of the place where the marriage has taken place."*

[985] Art. 5 of the Thailand Conflict of Laws Act. *"5. Whenever a law of a foreign country is to govern, it shall apply in so far as it is not contrary to the public order or good morals of Thailand."*

2.8.4.2 Solemnization and registration of marriage

Thailand and Indonesia determine similarly with respect to the applicable law of marriage solemnization. A marriage between their citizens outside their territory shall be according to the local prevailing law of a country where the marriage takes place. It reflects the application of *lex loci celebrationis.* However, it also gives limitation that the states shall recognize such marriage only if it is in line with its own laws and regulations.

Marriage registration in an embassy or consular is regulated differently. Thailand provides an alternative and registration is not an obligation for a couple. In Indonesia, registration at an Indonesian embassy or consular is not an option. It is an obligation of Indonesian nationals to register their marriage in an Indonesian embassy or representative office.

The limitation in general can be found in the provisions of Art. 5 of the Thailand Conflict of Laws Act.[986] It states that a foreign law is applied only to the extent that it does not contradict Thailand public order or good morals. In Indonesia, this limitation does not directly mention public order. However, it is mentioned in Art. 56 that an Indonesian national must not contradict the provisions of MA 1974.

2.9 Vietnam

Vietnam has a particular chapter in the Vietnamese Marriage Law 2014 and further implementing regulation that regulate a marriage and family relation involving foreign elements.[987] The chapter also contains the provisions on a marriage between a

[986] Art. 5 of the Thailand Conflict of Laws Act. *"5. Whenever a law of a foreign country is to govern, it shall apply in so far as it is not contrary to the public order or good morals of Thailand."*

[987] Vietnamese Marriage Law 2014, Chapter VII regarding A Marriage and Family Relations Involving Foreign Elements, Art. 121-130. Those articles stipulate the protection of lawful rights and interests of parties to a marriage and family relation involving foreign elements (Art. 121), application of laws to a marriage and family relation involving foreign elements (Art. 122), competence to settle cases and matters of marriage and family involving foreign elements (Art. 123), consular legalization of papers and documents of marriage and family (Art. 124), recognition and writing of judgements and decisions of foreign courts and competent foreign agencies on marriage and family (Art. 125), marriage involving foreign elements (Art. 126), divorce involving foreign elements (Art. 127), identification of parents and children involving foreign elements (Art. 128), support obligation involving foreign elements (Art. 129), and application of the agreed matrimonial property regime, settlement of consequences of the co-living of men and women as husband and wife without marriage registration involving foreign elements (Art. 130). The further implementing regulations are described in the Decree No. 126/2014/ND-CP dated December 31, 2014 regarding Detailing a Number of Articles and Measures for Implementation of the Law on Marriage and Family.

Vietnamese citizen and foreign citizen and its solemnization within the territory of Vietnam, as well as a foreign couple within Vietnam.[988]

The Vietnamese Marriage Law 2014 stipulates that a marriage and family relation involving foreign elements shall be respected and protected in accordance with Vietnamese law and treaties to which Vietnam is a contracting party. In a marriage and family relation with a Vietnam citizen, unless provided otherwise, foreigners in Vietnam shall have the same rights and obligations similar to Vietnamese citizens. The state shall protect the lawful rights and interests of Vietnamese citizens who are abroad in their marriage and family relation in accordance with laws of Vietnam, host country and international laws and practices.[989] It means that the Vietnamese Marriage Law 2014 is the applicable law to a marriage and family relation involving foreign elements. In case that a treaty to which Vietnam is a contracting party contains provisions different from those of this Law, the provisions of such treaty prevail.

If the Vietnamese Marriage Law 2014 refers to the application of a foreign law, such foreign law shall apply. In case that a foreign law refers back to the Vietnamese law, Vietnamese Marriage Law 2014 shall apply.[990] The foreign law as stated above shall apply provided that such application does not contradict the fundamental principles laid down in Art. 2 of the Vietnamese Marriage Law 2014.[991] The foreign law shall not

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[988] Art. 121 (1) of the Vietnamese Marriage Law 2014. *"1. In the Socialist Republic of Vietnam, marriage and family relations involving foreign elements shall be respected and protected in accordance with Vietnamese law and treaties to which the Socialist Republic of Vietnam is a contracting party.*

[989] Art. 121 of the Vietnamese Marriage Law 2014. *"121. (Protection of lawful rights and interests of parties to marriage and family relations involving foreign elements) (1) In the Socialist Republic of Vietnam, marriage and family relations involving foreign elements shall be respected and protected in accordance with Vietnamese law and treaties to which the Socialist Republic of Vietnam is a contracting party. (2) In their marriage and family relations with Vietnamese citizens, unless otherwise provided by Vietnamese law, foreigners in Vietnam have the same rights and obligations like Vietnamese citizens. (3) The Socialist Republic of Vietnam State shall protect lawful rights and interests of Vietnamese citizens abroad in their marriage and family relations in accordance with Vietnamese law, the host country's law and international law and practices. (4) The Government shall detail the settlement of marriage and family involving foreign elements in order to protect lawful rights and interests of the parties and guarantee the implementation of Clause 2, Article 5 of this Law."*

[990] Art. 122 of the Vietnamese Marriage Law 2014. *"122. (Application of laws to marriage and family relations involving foreign elements) (1) Unless otherwise provided by this Law, the legal provisions of the Socialist Republic of Vietnam concerning marriage and family are applicable to marriage and family relations involving foreign elements. In case a treaty to which the Socialist Republic of Vietnam is a contracting party contains provisions different from those of this Law, the provisions of such treaty prevail. (2) In the case this Law and other legal documents of Vietnam refer to the application of a foreign law, such foreign law shall apply, provided such application does not contravene the fundamental principles laid down in Article 2 of this Law. In the case a foreign law refers back to the Vietnamese law, Vietnam's marriage and family law shall apply. (3) In case a treaty to which the Socialist republic of Vietnam is a contracting party refers to the application of a foreign law, such foreign law shall apply."*

[991] Art. 2 of the Vietnamese Marriage Law 2014. *"2. (Fundamental principles of the marriage and family regime) (1) Voluntary, progressive and monogamous marriage in which husband and wife are equal; (2) Marriage between Vietnamese citizens of different nationalities or religions, between religious and non-religious people, between people with beliefs and people without beliefs, and between Vietnamese citizens and foreigners shall be respected and protected by law; (3) to build prosperous, progressive and happy families; family members have*

contradict, among others, the principle of voluntary, monogamy in marriage, as well as equality of legal protection of marriage, either between non-believers, believers, Vietnamese citizens, or foreign citizens.

2.9.1 Capacity to marry

Parties to a marriage either Vietnamese citizens or foreigners shall comply with the law of a country where they become a citizen. This principle is applied to determine the capacity to marry, thus Vietnamese citizens are subject to the Vietnamese Marriage Law 2014 and foreigners are subject to their national law.[992] Additional requirements are imposed on Vietnamese nationals who serve in the army or whose work is directly related to state secrets. They must have a written confirmation that their marriage does not affect the protection of state secrets or does not contradict regulations of that sector.[993]

An exception is made to a marriage conducted by competent Vietnamese agencies. For such marriage, foreign citizens shall also comply with provisions of the Vietnamese Marriage Law 2014 on marriage conditions.[994] This provision also apply to foreign couples who permanently reside in Vietnam and solemnize their marriage at competent Vietnamese agencies, thus they must comply with provisions of the Vietnamese Marriage Law on marriage conditions.[995]

A foreign national who is a non-resident in Vietnam is still subject to its national law.[996] The capacity to marry must be proven by a certification issued by a competent agency

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the obligation to respect, attend to, care for, and assist one another; to treat children without discrimination; (4) the Vietnam government and society and families shall protect and support children, elderly people and persons with disabilities in exercising marriage and family rights; assist mothers in properly fulfilling their lofty motherhood functions; and implement family planning; (5) to perpetuate and promote the Vietnamese nation's fine cultural traditions and ethics on marriage and family. "

[992] Art. 126 (1) of the Vietnamese Marriage Law 2014. *"126. (Marriage involving foreign elements) (1) For marriages between Vietnamese citizens and foreigners, each party shall comply with his/her country's law on marriage conditions; if their marriage is conducted at a competent Vietnamese state agency, the foreigner shall also comply with this Law's provisions on marriage conditions.*

[993] Art. 20 (2)(a) of Decree No. 126/2014/ND-CP dated December 31, 2014. *"… (a) A Vietnamese citizen who serves in the armed forces or whose work is directly related to state secrets shall submit a written confirmation by the central – provincial – level line management agency or organization that this person's marriage to a foreigner does not affect the protection of state secrets does not contravene regulations of that sector; …"*

[994] See again above Art. 126 (1) of the Vietnamese Marriage Law 2014.

[995] Art. 126 (2) of the Vietnamese Marriage Law 2014. *"126. (Marriage involving foreign elements) … (2) Marriages between foreigners permanently residing in Vietnam at competent Vietnamese agencies must comply with this Law's provisions on marriage conditions."*

[996] Art. 20 (2)(c) of Decree No. 126/2014/ND-CP dated December 31, 2014. *"(c) A non-resident foreigner in Vietnam shall submit a written certification that he/she is eligible to get married issued by a competent agency of the country of his/her citizenship, unless the law of that country does not prescribe the grant of such certification."*

of the relevant country of his/her citizenship. In relation to dual or multiple nationalities, both national laws shall apply.[997]

2.9.2 Administrative Requirements of Marriage

The Vietnamese Marriage Law 2014 requires registration at a competent state agency for a valid marriage. The competence to register civil status related to a marriage and family relation involving foreign elements must comply with the Vietnamese law on civil status.

Any unregistered marriage shall be considered invalid. The same provision is also applied to a foreign couple who are a permanent resident in Vietnam, as well as marriage between a Vietnam citizen and foreign citizen.[998]

Registration is the point of validation of marriage in Vietnam, thus a man and woman who cohabit as husband and wife without registering their marriage have no right and obligation between them. If they register their marriage in the future in accordance with law, their marriage relationship shall be established from the time of marriage registration.[999]

A case between a man and woman cohabiting without any marriage registration with foreign elements shall be settled by competent Vietnamese agencies according to the Vietnamese Marriage Law 2014.[1000]

In general, the Vietnamese Marriage Law 2014 states that the competence to settle cases and matters of marriage and family involving foreign elements at a court must comply with the Civil Procedure Code. District courts with jurisdiction where Vietnamese citizens resides are competent to, among others, cancel a marriage between Vietnamese

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[997] Art. 20 (2)(b) of Decree No. 126/2014/ND-CP dated December 31, 2014. *"(b) A Vietnamese citizen who concurrently holds a foreign citizenship shall submit a document proving his/her marital status issued by a competent foreign agency."*

[998] Art. 9 (1) of the Vietnamese Marriage Law 2014. *"9 (Marriage registration) (1) A marriage shall be registered with a competent state agency in accordance with this Law and the law on civil status. A Marriage which is not registered under this Clause is legally invalid."*

[999] Art. 14 jo. 123 of the Vietnamese Marriage Law 2014. *"14. (Settlement of consequences of men and women cohabiting as husband and wife without marriage registration) (1) A man and woman eligible for getting married under this Law who cohabit as husband and wife without registering their marriage have no rights and obligation between husband and wife. Rights and obligations toward their children, property, obligation and contract between the partners must comply with Article 15 and 16 of this Law. (2) For a man and woman who cohabit as husband and wife under Clause 1 of this Article and later register their marriage in accordance with law, their marriage shall be established from the time of marriage registration."*

[1000] Art. 130 of the Vietnamese Marriage Law 2014. *"130. (Application of the agreed matrimonial property regime; settlement of consequences of the co-living of men and women as husband and wife without marriage registration involving foreign elements) In case of receiving request for settlement of the application of the agreed matrimonial property regime; or relations of men and women co-living as husband and wife without marriage registration involving foreign elements, competent Vietnamese agencies shall apply the provisions of this Law and other relevant Vietnamese laws to settle these requests."*

citizens residing in border areas and citizens of neighboring countries living in areas bordering with Vietnam in accordance with the Vietnamese Marriage Law 2014 and other prevailing Vietnamese laws and regulations.[1001]

Decree No. 126/2014/ND-CP dated December 31, 2014 stipulates that marriage registration according to the Vietnamese Marriage Law applies to a marriage between (a) a Vietnamese national and foreign national, and (b) Vietnamese nationals one of whom resides abroad, (c) Vietnamese nationals who register temporary residence but are not a permanent resident abroad, (d) two foreign nationals upon request, either permanent resident or temporary resident.[1002]

2.9.3 Marriage outside Vietnam

A marriage between Vietnamese nationals outside its territory and or registration after the couple return to Vietnam are not provided for clearly in the Vietnamese Marriage Law 2014. However, there are provisions that regulate a marriage in a Vietnamese representative office. They state that a marriage between Vietnamese nationals or between a Vietnamese national and foreign national taking place abroad can be performed in a Vietnamese representative office (embassy, diplomatic mission, consular representative office and other agencies authorized to perform the consular function abroad), if such registration does not contradict the law of the host countries.[1003] However, marriage registration is not an obligation for a Vietnamese couple. It is voluntary, because registration at a Vietnamese representative office shall be performed

[1001] Art. 123 of the Vietnamese Marriage Law 2014. *"123. (Competence to settle cases and matters of marriage and family involving foreign elements) (1) The competence to register civil status related to marriage and family relations involving foreign elements must comply with the law on civil status. (2) The competence to settle cases and matters of marriage and family involving foreign elements at court must comply with the Civil Procedure Code. (3) District-level People Courts of localities where Vietnamese citizen reside are competent to cancel illegal marriages, settle divorce cases, disputes over the rights and obligations of husband and wife, parents and children, recognition of parents, children, child adoption guardianship between Vietnamese citizens residing in border areas and citizens of neighboring countries living in areas bordering on Vietnam in accordance with this Law and other Vietnamese laws."*

[1002] Art. 19 (1), (2) of Decree No. 126/2014/ND-CP dated December 31, 2014. *"19. (Competence to register marriages) 1. Provincial-level People's Committees of localities where Vietnamese citizens register their permanent residence shall register marriages between Vietnamese citizens and foreigners and between Vietnamese citizens at least one of whom resides abroad. For Vietnamese citizens who register temporary residence but not permanent residence in accordance with the residence law, provincial-level People's Committees of localities where Vietnamese citizens register temporary residence shall register their marriages. 2. In case two foreigners request marriage registration in Vietnam, the provincial-level People's Committee of the locality where one of them registers permanent residence shall register their marriage. If both do not register permanent residence in Vietnam, the provincial-level People's Committee of the locality where one of them registers temporary residence shall register their marriage."*

[1003] Art. 19 (3) of Decree No. 126/2014/ND-CP dated December 31, 2014. *"Vietnamese diplomatic missions, consular representative missions and other agencies authorized to perform the consular function abroad (below referred to as representative missions) shall register marriage between Vietnamese citizens and foreigners if such registration does not contravene the laws of host countries."*

upon their request.[1004] Both stipulations indirectly show the Vietnamese Marriage Law 2014 stipulates that marriage solemnized abroad shall be according to the local law of a country where the marriage takes place. Registration at a Vietnamese representative office shall even be made provided that it does not contradict the local law.

The state shall protect the lawful rights and interests of Vietnamese citizens who are abroad in their marriage and family relation in accordance with the laws of Vietnam, host country and international laws and practices.[1005] This principle is reflected in its provision on the recognition of marriage taking place abroad in Decree No. 126/2014/ND-CP dated December 31, 2014. Its regulation states that the recognition of marriage taking place abroad shall be made in Vietnam if the marriage complies with the foreign law and at the time of marriage, the couple fulfill the marriage conditions stipulated in the Vietnamese Marriage Law 2014.[1006]

It is slightly different from the previous Vietnamese marriage law which was promulgated in 1986. Such act clearly mentions that a marriage between Vietnamese citizens abroad shall be recognized by the diplomatic mission of Vietnam in that country.[1007]

[1004] Art. 19 (3) para (2) of the Decree No. 126/2014/ND-CP dated December 31, 2014. "*Representative missions shall register marriage between Vietnamese citizens residing abroad if so requested.*"

[1005] Art. 121 of the Vietnamese Marriage Law 2014. *"121. (Protection of lawful rights and interests of parties to marriage and family relations involving foreign elements) (1) In the Socialist Republic of Vietnam, marriage and family relations involving foreign elements shall be respected and protected in accordance with Vietnamese law and treaties to which the Socialist Republic of Vietnam is a contracting party. (2) In their marriage and family relations with Vietnamese citizens, unless otherwise provided by Vietnamese law, foreigners in Vietnam have the same rights and obligations like Vietnamese citizens. (3) The Socialist Republic of Vietnam State shall protect lawful rights and interests of Vietnamese citizens abroad in their marriage and family relations in accordance with Vietnamese law, the host country's law and international law and practices. (4) The Government shall detail the settlement of marriage and family involving foreign elements in order to protect lawful rights and interests of the parties and guarantee the implementation of Clause 2, Article 5 of this Law."*

[1006] Art. 36 of Decree No. 126/2014/ND-CP dated December 31, 2014. *"36. (Conditions for and forms of recognition of Vietnamese citizens' marriage already settled at competent foreign agencies abroad.) 1. The marriage between Vietnamese citizens or between a Vietnamese citizen and a foreign which has been settled at a competent foreign agency abroad shall be recognized in Vietnam when it satisfies the following conditions: (a) the marriage complies with the foreign law; (b) At the time of getting married, the partners satisfy the marriage conditions prescribed by the Law on Marriage and Family of Vietnam. In case the marriage conditions are violated under Vietnamese law but at the time of requesting marriage recognition, the consequences of such violation have been remedied or the marriage recognition is favourable in protecting the interests of women and children, such marriage shall be recognized in Vietnam. 2. The marriage recognition prescribed in Clause 1 of this Article shall be recorded in the marriage registration book according to the procedures prescribed in Article 38 of this Decree."*

[1007] Art. 8 par (2) of the Vietnamese Marriage Law 1986. *"8. … A marriage between Vietnamese citizens abroad shall be recognized mission of the Socialist Republic of Vietnam in that country. …"*

2.9.4 Comparison to Indonesia

2.9.4.1 Capacity to marry

The Vietnamese Marriage Law 2014 and MA 1974 apply the same principle to determine the capacity to marry, namely the Principle of Nationality. The national law of a person determines the capacity to marry as the applicable law. This similarity between the states leaves no room for the application of *renvoi.*

The Vietnamese Marriage Law 2014 stipulates that a person who marries in Vietnam, either foreign national or permanent resident, is subject to the Vietnamese Marriage Law 2014. If a couple, either both or one of them is a Vietnamese national, who marry abroad would like to have marriage recognition, they have to follow the Vietnamese Marriage Law 2014, in addition to the local law of a country where the marriage takes place. The Vietnamese Marriage Law 2014 details the above in writing and is silent on stateless persons. However, it can be concluded that stateless persons who reside in Vietnam are subjects to the Vietnamese Marriage Law, either as permanent resident or temporary resident.

MA 1974 stipulates similarly that MA 1974 as the national law shall apply to Indonesian nationals. As a consequence, foreign nationals shall subject to their national law. MA 1974 is silent on permanent residents, temporary residents, persons of dual or multiple nationalities, and stateless person. The law applicable to those persons shall be according to the effective nationality or in case of stateless persons, Indonesia considers their habitual domicile. Those considerations are based on the thoughts and arguments of Indonesian PIL Scholars. [1008]

If based on the Principle of Nationality, Vietnam law refers to a foreign law, then the foreign law shall be applied. In case that the foreign law refers back to Vietnamese law, the Vietnamese Marriage Law 2014 shall apply. The application of Vietnam law reflects that Vietnam receives *renvoi*.[1009] Indonesia applies the same principle. If Indonesia refers to a national law of a person, such foreign law shall enforce as the applicable law. From jurisprudence and scholars' opinion, it can be concluded that Indonesia receives *renvoi*.[1010]

[1008] See discussion of the opinion of Indonesian scholars in Sub-chapter 3.6.3 regarding the Academic Bill of Indonesian PIL, in particular the opinion of Sudargo Gautama and Zulfa Djoko Basuki.

[1009] Art. 122 (2) and (3) of the Vietnamese Marriage Law 2014. See the footnote above.

[1010] See discussion of the opinion of Indonesian scholars in Sub-chapter 3.6.3 regarding the General Provisions of Academic Bill of Indonesian PIL.

2.9.4.2 Solemnization and registration of marriage

Vietnam and Indonesia determine similarly in respect of marriage solemnization within their territory. Both states stipulate that their law shall be the applicable law of marriage solemnization within their territory. This is according to the principle of *lex loci celebrationis*. The Vietnamese Marriage Law 2014 is applicable within the territory of Vietnam and MA 1974 is applicable within the territory of Indonesia.

In relation to a marriage outside Indonesian territory, MA 1974 states clearly that the marriage is valid if it is according to the local law and does not contradict MA 1974. Vietnam also stipulates similarly. A marriage shall be recognized in Vietnam if it is according to the local law of a country where the marriage takes place and the Vietnamese Marriage Law 2014.

In relation to marriage recognition, Indonesia and Vietnam state similarly that it must be according to the local law of a country where the marriage takes place and also their national laws, the Vietnamese Marriage Law 2014 or MA 1974, as relevant. It means that the Vietnamese Marriage Law 2014 will apply the foreign law (the marriage) provided that such application does not contradict the principles of the Vietnamese Marriage Law 2014. The foreign law shall not contradict, among others, the principles of voluntary, monogamy in a marriage, as well as equality of legal protection of marriage, either between non-believers, believers, Vietnamese citizens, or foreign citizens. This stipulation is also the same as MA 1974 which states that a marriage held abroad shall be considered valid if it is solemnized according to the local law, provided that it is in line with MA 1974.

3 Summary of Comparison

Description of the preceding provisions brings out similarities and divergences amongst the regulation of marriage having foreign elements. This section will feature, first: determination of the applicable law for the capacity to marry, namely (i) principle of nationality and (ii) principle of domicile, respectively; second: possibility of *renvoi,* device to bridge the said two principles; and third: (iii) marriage solemnization. The other points are about (iv) public policy as well as mandatory rules as limitation, and (v) recognition of marriage taking place abroad.

3.1 Capacity to marry: the principle of national law.

Cambodia, Lao PDR, Indonesia, the Philippines, and Thailand apply their national laws to their nationals in determining the capacity to marry, known as the Principle of Nationality. Due to similarity, the application of *renvoi* amongst them is impossible.

In relation to persons of dual or multiple nationalities, permanent residents, temporary residents, stateless persons, each state has their own regulations. The application of such principle is not similar or identical to one another, as there are some exceptions and or variations to it.

The Philippine Family Code is silent on dual or multiple nationalities. Indonesia is also in such position as MA 1974 states none. Philippine and Indonesian scholars are of the opinion that the applicable law shall be determined according to the most effective nationality – instead of domicile or residence.

In relation to permanent residents, both states are silent. The provisions above show that the Philippines and Indonesia use the Principle of Nationality as the main rule to determine the applicable law. In relation to refugees, the Philippines requires an affidavit about their status, similar to stateless persons. Indonesia states none about refugees.

The Thailand Conflict of Law Act stipulates that stateless persons and persons of dual or multiple nationalities shall follow the law according to their residence, or in other words, residence shall be the point of contact. As long as they have their residence in Thailand, Thailand law shall be applied as the applicable law to them. If there is contradiction with the Thailand law, the Thailand law shall govern. In respect of stateless persons, Indonesia considers similarly that the domicile of the persons concerned is the point of contact to determine the applicable law. However, in relation to persons of dual or multiple nationalities, the applicable law shall be determined according to the most effective nationality – instead of domicile or residence.

In relation to the permanent residents, both states are silent. The provisions above show that Thailand and Indonesia use the Principle of Nationality as the main rule to determine the applicable law.

The preceding description shows, at least, two main methods for determining the applicable law of substantive requirements for future spouses. The classic devices remain the same, namely the Principle of Nationality and the Principle of Domicile. The Principle of Nationality employs the spouse's national law to determine the substantive requirements for a marriage. The Principle of Domicile employs the law of a country where a spouse has a domicile to determine the substantive requirements for a marriage.

3.1.1 Principle of Nationality of Nationals

The Principle of Nationality is shown when States stipulate that the national law shall apply to the personal law of their nationals wherever they go. There are several states which apply the Principles of Nationality to determine the applicable law of the capacity to marry. They are Cambodia, Lao PDR, Indonesia, Myanmar, the Philippines, Thailand

and Vietnam. The application of such principle is not similar or identical to one another as there are some exceptions and or variations to it.

3.1.1.1 Principle of Nationality (only)

The word "only" in the caption above means that the States stipulate that the national law applies to their nationals, without any additional requirements. The limitation is the general requirements, for instance, public policy of the state which becomes the forum of celebration.

Indonesia, the Philippines, Thailand and Vietnam regulate that their national law applies to the determine the capacity to marry of their nationals. Consequently, foreign nationals within their territory shall also be subject to their national law. This capacity shall be proven by a statement of certificate issued by the authorized institution of the relevant state.

3.1.1.2 Principle of Nationality with additional requirements

In this respect, the State mentions that the national law of bride and groom shall be applied to them. In relation to foreign nationals, beside the national law of the persons concerned, they must also fulfill other or additional requirements in determining the capability of the foreigners concerned to marry.

In this case, Cambodia imposes additional requirements for the capacity to marry on a foreign groom. It requires that a foreign groom must be below 50 years old and earns money at least $2,500 per month. The requirements do not apply vice versa to foreign women, or in other words, no additional requirement is imposed on foreign women. The background of these additional requirements is to protect Cambodian women.[1011] The purpose is reasonable, but it is not equal in terms of gender as there is no such requirement for Cambodian women.

3.1.1.3 Principle of Nationality in addition to national law of the State of celebration

Slightly different from the above, the requirement in addition to the national law is the law of State which becomes the forum of celebration. Therefore, a person must follow his/her national law and the local law of a country where the marriage is solemnized.

Vietnam requires that upon marriage recognition, Vietnamese nationals must comply with the local law of a country where the marriage takes place and provisions of the Vietnamese Marriage Law 2014 on marriage conditions.

[1011] Please see discussion in sub-chapter 2.2.1 of this Chapter.

3.1.2 Principle of Domicile

The principle of domicile provides that the applicable law of a person shall be determined by the law of a country where he/she has his/her domicile. There are several states which apply the Principle of Domicile to determine the applicable law of the capacity to marry, namely Brunei, Malaysia, Myanmar and Singapore. Those four states are the ASEAN Member States which apply the Principle of Domicile. However, not all of the provisions are similar or identical. There are some exceptions to the provisions.

Brunei Darussalam, Malaysia and Myanmar mention that their national law apply to parties (who are Moslems) permanently residing within their territory. It is also applied to parties who reside without the intention to permanently (*bermukim*) stay or reside in a certain area.

Those provisions have placed the intention (*animus manendi*) to permanently stay (*bermastautin*) or reside in another place as the requirement to apply the local law as the new applicable law. It means that the law of Brunei or Malaysia can be set aside by the new law if the person concerned shows his/her intention to permanently stay or reside outside their territory. *Animus manendi* or intention to stay or reside becomes the primary requirement to replace the law of domicile. In addition, a person who is a citizen of Malaysia or Singapore shall be deemed, until proven to the contrary, to be domiciled in Malaysia or Singapore. This provision shows that the domicile cannot be changed easily. It is attached to a citizen similar to nationality.

Singaporean regulation also involves "intention" in relation to the applicable law. The Women's Charter provides a possibility of the domicile law, and even the intended matrimonial domicile in the future of a spouse.

The Principle of Nationality and Principle of Domicile are applied by the ASEAN Member States in their own way that makes some variations in their classic definitions. The application shows the implementation of the Principle of Nationality with variations in (i) the classic Principle of Nationality, in Lao PDR, Indonesia, the Philippines and Thailand; (ii) Principle of Nationality with additional and particular requirements, in Cambodia; and (iii) Principle of Nationality in addition to the national law of forum state, in Vietnam. The Principle of Domicile applies in Brunei, Malaysia, Myanmar and Singapore.

3.1.3 Applicable Law of Dual or Multiple Nationalities

Difficulties arise in states that apply the Principle of Nationality when a person has dual or multiple nationalities. The question is whether both or all national laws shall be applied simultaneously or is there a particular prescription to refer to one applicable law. The ASEAN Member States have their own provisions to such situation. A state can

refer to the domicile or residence of a person or stipulates its own law (which is the forum state) as the applicable law. It shall be discussed below.

3.1.3.1 Latest Nationality Acquired by a Person

In case of dual or multiple nationalities, law of the last acquired nationality shall govern. This provision is stipulated by Thailand.

3.1.3.2 Domicile or residence of a person

In case of dual or multiple nationalities, the applicable law is determined according to domicile or to a lesser degree, residence. The applicable law is not the national law, but the law of a country where a person has his/her domicile or residence. The provision above can be found in Thailand which states that if a person has two or more nationalities, the state where the person has his domicile shall govern. Another possibility is a state where the person has his/her domicile at the time the legal action is taken or where he/she has his residence.

3.1.3.3 Nationality of the Forum State

Indonesia will more likely stipulate the Indonesian law as the applicable law if one of the nationalities is Indonesian nationality. This can be found in the Bill of 2015. At this moment, if nationalities of the person in question are all foreign nationalities, Indonesia will determine the applicable law according to the person's domicile.

3.1.4 Dual or Multiple Domiciles

In the event of dual domicile, a person possesses the capacity to marry as prescribed by the law of his/her domicile at a point in time just before the solemnization of marriage or alternatively, law of the intended matrimonial home. To overcome technical difficulties, such person, for instance a Singaporean, shall be deemed to be domiciled in in Singapore, until approved otherwise.

3.1.5 Applicable Law of Stateless Persons

In determining the applicable law of stateless persons, there are some variations amongst the ASEAN Member States. The instruments are domicile, residence, statement of the person concerned and or they can be treated as their own nationals despite their domicile or residence.

3.1.5.1 Principle of Domicile of Stateless Persons

With respect to stateless persons, the applicable law is determined by the law of a country where they have their domicile. In this situation, if a stateless person has a domicile in Indonesia, the law of Indonesia is applied to him/her in determining his/her

capacity. Academic writings of Indonesian scholars and also the Bill of 2015 support this thought.

3.1.5.2 Local Law of a Country where Stateless Persons Have Their Residence

With respect to stateless persons, the law of a country where they have their residence determines their capacity. In this case, *animus manendi* does not need to be proven. The actual daily life which connects the person concerned to his/her surroundings sufficiently serves as the evidence of residence and further, determines the applicable law.

In this case, Thailand indicates those provisions by providing that a stateless person shall be governed by the law of a country where he has his residence.

3.1.5.3 Stateless Persons are treated as foreigners

Stateless persons are considered as foreigners. Therefore, the applicable law shall be determined similarly to foreigners. Since a stateless person has no national law, he/she must provide an affidavit stating the circumstances which show his/her capacity to marry. This provision appears in the Philippines.

3.1.5.4 Stateless Persons are treated as nationals

Stateless persons are considered as citizens. Therefore, the applicable law shall be the law applied to its nationals. This provision can be found in Lao PDR (see sub-chapter 6.2.3.1).

3.1.6 Applicable Law of Permanent Resident Foreigners

Applying the Principle of Nationality in determining the applicable law rigidly is sometimes inapplicable. It is considered inappropriate if a foreigner has his/her actual life or daily activity for a long period of time and permanently resides in a territory as well as has no intention to move his/her residence. Since he/she is involved in the economic and social surroundings, applying the law of his/her nationality to his/her community is inappropriate. For the reason above, the applicable law which should be determined according to the Principle of Nationality is changed into the law of a country where the foreigner has his/her permanent residence.

Vietnam provides for these provisions. It states that a foreigner who permanently resides in Vietnam is subject to the Vietnamese Marriage Law 2014. This provision also applies to a foreign couple who permanently reside in Vietnam and to solemnize their marriage at the competent Vietnamese agencies, they must comply with provisions of the Vietnamese Marriage Law on marriage conditions. In addition, Brunei, Indonesia, Lao PDR, Malaysia, and Myanmar also provide for the same.

3.1.7 Applicable Law of Refugees

Refugees have particular conditions which make them different from stateless persons or foreigners. Refugees are not stateless because they actually have a nationality, but they are unable or not willingly to return to their country of origin due to well-founded fear of being persecuted for the reason of race, religion, nationality, membership of a particular social group or political opinion.[1012]

With respect to this particular condition, only the Philippines stipulates a particular provision. The Philippines does not require an official statement from the relevant consular or diplomatic office, because of the situation of refugees. Instead of such statement, the Philippines requires an affidavit stating the circumstances showing the capacity to marry of the relevant refugees.

3.2 Principle of Nationality hand in hand with the Principle of Domicile

The particular situations stated above, namely stateless persons, persons of dual or multiple nationalities, refugees, demonstrate that the sole application of the Principle of Nationality and the Principle of Domicile can result in injustice. The purpose of this paragraph is not to determine which one is the best or better one.

Solely applying the Principle of Nationality or Principle of Domicile in determining the applicable law rigidly is an unsuitable option. It is evident in a foreigner who is permanently domiciled or stays for a long period of time in a society and is involved in the economic and social surroundings. In addition, a person can easily move nowadays and globalization should be facilitated properly.

The description above shows that the ASEAN Member States use both of such classic principles to overcome the situation. However, each of them places their ultimate principle and then, gives a priority to another principle according to a particular situation. Therefore, the ASEAN Member States adopt a "mixed system", instead of one classic principle, in determining the applicable law of personal status and the proportion varies from one to another. Notwithstanding those variations, the author sees those

[1012] Art. 1.A paragraph 2 of the Convention Relating to the Status of Refugees. *"2. As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having nationality and being outside of the country of his former habitual residence as a result of such events, is unable, or, owing to such fear, is unwilling to return it. In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."*

devices actually achieve the same objective, namely the closest connection with a person.

3.3 Renvoi

Having considered the applicable law above of a person and or personal status, it appears that *renvoi* is unlikely to be applied. It is so because "domicile", as described above, is attached to a citizen similar to nationality. Since there is a possibility for existence, *renvoi* is still discussed. The *renvoi* occurs when the conflict of law rule of the forum refers to a foreign law, and such reference includes or excludes the conflict of law rule of the foreign law. The former alternative refers to *lex cause* (accept *renvoi*), while the latter pays no heed to the reference (reject *renvoi*). This alternative is important if there is an actual difference between the conflict of law rule of the foreign law and of the forum, where the foreign law refers to another foreign law. The two situations are commonly distinguished when the foreign conflict of law rule refers back to the forum or *lex fori* (remission or *renvoi* in the first degree) or to a third state (transmission or *renvoi* in the second degree).[1013]

Singapore and Myanmar do not recognize the doctrine of *renvoi*.[1014] In the marriage laws and regulations of Brunei Darussalam, Malaysia and Cambodia, the author cannot find any reference to this doctrine. Although based on history, the author presumes that Brunei and Malaysia adopt a special condition for the acceptance of *renvoi* or known as the foreign court theory in the English law, but cannot refer to the specific article in their marriage law.

3.3.1 Remission

Indonesia, the Philippines, Thailand and Vietnam are the ASEAN Member States which show the acceptance of *renvoi.* Thailand mentions it in Art. 4 of the Thailand Conflict of Laws[1015] and Vietnam mentions it in Art. 122 (2) and (3) of the Vietnamese Marriage

[1013] Lennart, pp. 106

[1014] Robert Merkin and Johanna Hjalmarsson, *Singapore Arbitration Legislation: Annotated,* 2nd Ed., (Oxon and New York: Informa Law From Routledge, 2016), p. 219. Adrian Briggs, *Private International Law in Myanmar*, (Oxford: University of Oxford, 2015), p. 79.

[1015] "When a foreign law is to be applied and, under such foreign law, the Vietnamese law is applicable, then the Vietnamese law shall be applied, but without the legal principle of the Conflict of Laws."

Law 2014.[1016] Meanwhile, Indonesia and the Philippines show its acceptance in their court decisions.[1017]

Renvoi will not be extended to a contractual relationship as it is limited to family matters.[1018] The fact that *renvoi* does not apply to a contractual relationship is acceptable due to the fact that the choice of law agreed between the parties is considered to appoint the substantive law without the application of PIL rules or any reference to a foreign law. The application of PIL rules can lead to the possibility of *renvoi* or any further transmission. The application of *renvoi* or transmission in a contractual relationship will result in the rights and obligations of the parties being determined by a different law, instead of the law chosen by the parties. It is, in the first place, against the intention of the parties and can be against the expectation of the parties in the relevant agreement. Renvoi shall not be applied when immovable properties are involved.

3.3.2 Transmission

States which accept remission to *lex fori*, subject to the same extent and conditions, also prepared a reference to law of any third party by analogy. For instance, in academic writings, Indonesia also receives transmission (*penunjukkan lebih jauh*). In transmission, foreign states, which have been previously appointed by Indonesia law, appoint to the law of another state as the applicable law.

3.4 Form of extraterritorial marriage

It is customary to distinguish between the aspects of form and substance of marriage requirements. As the subject has already been discussed in the preceding sub-chapter, this sub-chapter shall be limited to the form of marriage solemnized abroad. An extraterritorial marriage denotes "an external conduct required of the parties or of third persons, especially public officers, necessary for the formation of a legally valid marriage."[1019] All other conditions that must be satisfied by a bride and groom, at the

[1016] "(2) In case this Law and other legal documents of Vietnam refer to the application of foreign law, such foreign law shall apply, provided such application does not contravene the fundamental principles laid down in Article 2 of this Law. In case a foreign law refers back to the Vietnamese law, Vietnam's marriage and family aw shall apply. (3) In case a treaty to which the Socialist Republic of Vietnam is a contracting party refers to the application of a foreign law, such foreign law shall apply."

[1017] In Indonesia, the academic writing also supports the acceptance of *renvoi*, as well as the Bill 2015. To date, there is no Indonesian PIL scholar who refuses to recognise *renvoi*. Sudargo Gautama mentioned that the acceptance of *renvoi* will provide a more precise implementation of Indonesian laws and regulations, as Indonesian judges will certainly know their own law better than that of other countries. Those improvements are significant as the implementation of the law has as its objective the correct execution of its principles and not exhibiting any judicial chauvinism.

[1018] Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia* (translation: Introduction to Indonesian Private International Law), *supra* note 14, p. 101.

[1019] Rabel as quoted by Lennard Palsson, p. 169.

minimum, age, free consent, non-existing marriage, belong to the substantive requirements and therefore, will be left out from this sub-chapter.

Conflicting problem of marriage in principle arises in two different situations, on the one hand, in the stage of marriage formation; on the other hand, when the marriage has already been entered into and its validity is being examined ex-post. For this, PIL has double functions. First, they provide a direct regulation on the competence of authorities and on law or laws to be applied to various aspects of marriage which is about to be or is being celebrated. In this matter, PIL rules serve primarily as directives for civil or religious officials lending their cooperation in the performance of marriage. Those directives are necessarily one-sided limited to a marriage to be celebrated before an official who has his authority from the *lex fori*. Second, PIL rules contain an indirect regulation on conditions for the competence of authorities and choice of law which must have been met when a marriage is celebrated in order for it to be held validly by a court or administrative authority of the forum of country which may have to pass on the question. The regulation is also applicable to a foreign marriage performed by a foreigner official under the authority of foreign law. In practice, this problem serves the stage of formation of marriage involving the validity of the celebrated marriage. The purpose of such question is usually aimed at declaration as to whether or not a marriage is valid- as a preliminary question in the case of divorce, maintenance right, succession claim, etc.

The municipal law described in the preceding chapter has, at least three main types of system. The first system is the compulsory civil form of marriage. Most of the ASEAN Member States adopt this kind of system. The second system is the compulsory religious solemnization of marriage. The third one is informal marriage. This system allows a marriage solely by the agreement of parties or otherwise, without requiring any formal act of solemnization. This system used to cover the informal act of parties who declare to take each other as husband and wife. Another form which may appear and can be said as the fourth system is a marriage by customary law. This marriage is celebrated according to the customary law within an ethnic group in front of their elders or respected parties who are informal or formal leaders amongst them.

In the following part, various rules and exceptions providing for the formal aspects of formation and validity will be compared and examined. To that end, this part will be distinguished into two parts. The first part is a marriage in local form, namely one that is performed or to be performed according to the *lex loci celebrationis*. The second one is an extraterritorial marriage that is performed or to be performed by virtue of some other laws.

3.4.1 Marriage in Local Form

3.4.1.1 Direct Regulation

The question to be answered here is the right of competence and duty of local authorities to lend their cooperation in the performance of marriage between foreigners, non-residents. This problem, in fact, bears a certain analogy to that of the jurisdiction of courts in matters involving foreign elements.

The term follows the law to which the authority to solemnize a marriage is subject. Public authorities decide their competence to celebrate a marriage on the basis of their own law and, when that question is affirmed, proceed to do so in accordance with the form prescribed by the same law (*auctor regit actum*).[1020] Whatever the nationality, non-resident bride or groom, of a couple may be and wherever the celebration takes place, the form is determined by the law of the officiating agent instead of their law.

3.4.1.2 Indirect Regulation

A marriage entered into in accordance with the form prescribed, or one of the permitted forms, by the local law of the state of celebration or complying at least with the mandatory formal requirements of that law, will be as valid as the form in that state. The nationality and domicile of the parties are immaterial for this purpose, and so is the recognition of marriage under their personal law. This is the application of the *locus regit rule*. The limitation to such application is public policy or fraud.

The ASEAN Member states can be divided into two parts. The first ones are states which regulate the authority to solemnize all marriages within the territory according to its national law, either between its national and foreigner or between foreigners. The second ones are states which authorize the solemnization of marriage between their national and foreign national only, while stating none or regulating otherwise for foreign couples within their territory.

The first part includes Brunei Darussalam, Cambodia, Indonesia, Malaysia, Myanmar, Singapore, and Thailand. Cambodia, in particular, requires physical attendance within its territory for foreigners for marriage solemnization. Indonesia regulates that a marriage between foreigners may be registered in the Indonesian Civil Registry, provided that the marriage is solemnized according to MA 1974.

The second part includes Lao PDR, the Philippines and Vietnam. Lao PDR, in its regulation, mentions that a marriage between foreigners may take place at the embassy or consulate of the respective country.

[1020] Lennart Palsson, pp. 172.

3.4.2 Extraterritorial marriage

An extraterritorial marriage covers a marriage which is, first, solemnized outside the territory of the state, either between nationals and between a national and foreigner, and second, held in the consular of foreign states. In relation to the form of marriage, the ASEAN Member States regulates it in a various manner. There are states regulating that the form of marriage must be equal to a local marriage, which may be in a religious form or marriage in the consular or its representative office.

3.4.2.1 Extraterritorial marriage which must be in the form of the national law

States in this particular situation require that a marriage solemnized abroad must be the same as the national law. In relation to how it is regulated, there are some variations. First, in marriage registration upon the return of the respective couple, the marriage must be re-adjudicated. If the marriage is found to be in line with the form of the national law, the marriage will be registered. Second, the state requires that solemnization is performed in its embassy or its representative office in a foreign state. Lastly, the state mentions the requirements of its acknowledgment.

3.4.2.1.1 Examination upon the return of couple

Brunei and Malaysia state that a marriage solemnized abroad, for a Moslem couple, must be according to the *Hukum Syarak*. For a non-Moslem couple, their marriage must also be registered. A couple's marriage must be registered within 6 months after they return to the territory. For registration purpose, the couple shall present evidence as may satisfy the Registrar. The evidence may be in a verbal form indicating their marriage or evidence of cohabitation and repute indicating that they have lived together as husband and wife. The evidence may also be in a documentary form, which is suffice to satisfy the registrar. In this matter, the registrar shall have the power to serve as a magistrate for the summoning and examination of witnesses and administration of oaths and affirmations. The registrar is entitled to pose questions and obtain answers, as he/she may think fit for explaining or substantiating the statements made in the declaration. The Registrar may refuse to register a marriage if he/she is not satisfied with the truth of any statement made to him. He/she is also authorized to postpone registration, in the event that he/she thinks he/she needs more evidence of the marriage.

3.4.2.1.2 Solemnization of marriage which must be in the representative office

The objective is similar, namely the form of marriage must be similar to the marriage within its territory. However, it regulates a bit differently as the state requires that a marriage must be solemnized in its representative office or consular marriage.

3.4.2.1.3 Marriage which must be in accordance with the national law

The last variation does not state that the provisions above, but the state mentions it will acknowledge a marriage solemnized abroad, if it is in line with the national marriage law. This provision can be found in Lao PDR, Myanmar and Vietnam.

3.4.2.2 Employing the local law: Lex Loci Celebrationis

The other form is to employ the form of local marriage. The state regulates that a marriage shall be according to the local law where the marriage is solemnized, of course with general limitation such as public policy. In general, it is known as the principle of *lex loci celebrationis.* This stipulation can be found in Indonesia, the Philippines and Thailand.

3.4.3 Consular Marriage

The consular form of marriage was developed in the 19th century, to facilitate the civil marriage at that time. A practical need for such marriage existed for Europeans stayed or resided away from the mother land where the local form of marriage was not available to foreigners and/or was based on a religious conception which is different from western countries. Alternatively, there was no satisfactory registration of civil status.[1021]

The term consular marriage means a marriage solemnized by or before a diplomatic or consular representative of one State (the Sending State) on the official premises of that State in the State in which the representative is accredited (the Receiving State). In this situation, an officer holds the ceremony and actively solemnizes a marriage. It is different from a consular officer who acts as a witness at a wedding ceremony performed according to the local law, even though the ceremony takes place on premises of the Sending state, or where his/her function consisting of recording or issuing a certificate of such marriage is excluded as this definition will be left aside.[1022]

The formal procedure followed in the solemnization of a consular marriage is the procedure prescribed by the law of the Sending State, from which the celebrating official receives his/her authority. Commonly, there are special provisions on announcement registration or matrimonial ceremony which differs from that applicable to an ordinary domestic marriage in the Sending state.

In general, the consular form of marriage provides an option in a sense that the State will alternatively be prepared to recognize a marriage concluded in the local form, in virtue of *lex loci celebrationis.* Mostly, the consular form is also the only alternative to the local form available to the parties if they want to be validly married according to the

[1021] Lennart Palsson, pp. 258-259.
[1022] Lennart Palsson, p. 258.

law of their home country, although it does not apply to countries authorizing an extraterritorial marriage in the religious form. In extremely exceptional cases, the consular form is regarded as obligatory for nationals by the Sending State denying recognition of marriages of such parties concluded in the local form of the foreign law.[1023]

Brunei, Cambodia, Indonesia and Malaysia allow and stipulate this kind of marriages, provided that the parties or one of the parties poses the nationality of the state. The author imagines that the background of these provisions is the matrimonial ceremony or religious ceremony which, for a Moslem couple, must be in accordance with *Hukum Syara'*. For Lao PDR, a marriage outside its territory must be acknowledged by the embassy. However, the marriage itself does not need to be solemnized within its embassy. In other states, the representative office accepts the registration of marriage after solemnization according to the local law. Myanmar is silent about it.

The position of consular marriage under the public international law has important consequences in the sphere of private law. When such marriage is authorized under the law of the Sending State and is permitted by the law of the receiving state or by the law of the Receiving State, it will be valid in both countries. The position of third states, in this case, will vary with the private international law policies of each country.[1024]

The condition for recognition of a consular marriage by the Receiving States is largely covered by corresponding condition for the authorization of such marriages by the Sending States. Any lack of coordination coming to the fore in many cases results in a limp marriage. This matter needs a complete concordance between the Sending and Receiving States, is certainly desirable and also ought to be practically feasible. The best means to achieve it is to regulate this form of marriage by an international agreement.

3.4.4 Recognition of extraterritorial marriage

There is a close connection between the form of marriage in which it is celebrated and the evidence of marriage. The law governing form must give a certain influence on the evidence of marriage. The connection between the two mentioned matters is extremely close, thus it can be described that the evidence of marriage is an aspect of its form. The law governing the form of marriage must also govern the evidence of marriage.[1025] The evidence of marriage is a disputable matter, as the point of controversy is delimitation

[1023] Lennart Palsson, p. 260.

[1024] *Ibid.*

[1025] Lennart Palsson, Loc. Cit. pp. 323. He states that the connection between two matters has sometimes been thought to be so strong as to require the *locus regit actum* rule usually governing the form of marriage to be supplemented by the formula *locus regit probationem actus*.

between the *lex loci celebrationis*, or such other law as may govern the form of marriage in the individual case, and the *lex fori*.

This is a part of general conflict problem of the law governing evidence. There are two main opinions which oppose each other. According to the first view, the law in accordance with which a legal action has been executed (the *lex cause* of its form) should be authoritative for the evidence of the act. In this system, evidence must be presented with written documents created for substantiation purpose and therefore, the power of appreciation left to the judge is relatively limited. With respect to a marriage, the only admitted means of evidence is, as a rule, a copy of extract from a register kept by a public authority and containing an entry of the marriage.

The second thought emphasizes the procedural aspects of evidence. It functions as a means for ascertaining truth in judicial proceedings and forming the conviction of the judge. This is a psychological phenomenon which is independent of the place where and the law under which the act to be proven has come into existence. Accordingly, such questions fall to be governed by the *lex fori*.

In relation to a marriage, the difference of principles briefly referred to here has no imminent impact.[1026] In practice, marriage registration after a couple return from abroad shall be conducted upon the evidence of marriage form. Treatment to the evidence is different and can be divided into two parts. The first part is states which accept and then register the marriage upon evidence or marriage certificate issued by a foreign state where the marriage is solemnized. In practice, states will perform general examination as to whether or not such marriage is in line with their national marriage law or contradicts its public policy, then it will register it. This part includes Indonesia, Lao PDR, the Philippines, Thailand and Vietnam.

On the contrary, there are Brunei, Malaysia and Singapore. Brunei and Malaysia will examine evidence as to whether or not it is in line with *Hukum Syara'* for a Moslem couple or civil marriage for a non-Muslim couple. Upon evidence, the states will register such marriage in their registration. For instance, Singapore will examine the blood relationship of the couple. If it is not allowed by the Women's Charter, the marriage shall not be registered.

The recognition or registration of marriage which is solemnized abroad can also be performed in the embassy or high commission or consulate office in the receiving state. This prosecution does not equal to the solemnization of marriage. In this case, a marriage is done or solemnized abroad. The embassy or high commission or consulate

[1026] Lennart Palsson, p. 324.

shall only acknowledge and register the respective marriage. This provision can be found in Lao PDR, Indonesia, and Thailand.

3.5 Public policy and mandatory rules

Each of the Member States has its own limitation to recognize a marriage which has foreign elements, whether one of the couples is a foreigner or marriage solemnized abroad.

Lao PDR stipulates that the requirements of minimum age and monogamy principle are applied to a foreigner who will marry a Lao PDR national. This application supersedes the national law of such person allowing it.[1027] He or she must meet the requirements stipulated in the Lao PDR's Marriage Law. Almost the same, Myanmar stipulates the monogamy principle applicable to all marriages although maybe, the religion law of the couple allowing a polygamous marriage. The Philippines states that a foreigner must comply with the substantive requirements in Art. 35-38 of the Philippine Family Code.

Brunei and Malaysia recognize that a marriage is valid, if it is solemnized according to the local law where the marriage takes place. The registration office will adjudicate the evidence as to whether or not the marriage is validly solemnized abroad before he/she registers the respective marriage. Singapore also limits the registration of marriage which is solemnized abroad. It states that the registrar in Singapore is empowered by the Women's Charter to register all marriages, if he/she is satisfied that the marriage concerned is not void under the Women's Charter. In other words, a marriage must follow the requirements of the Women's Charter.

In Thailand, the foreign law for this particular circumstance can be applied, provided that it does not contradict Thailand public order or good morals.[1028] Vietnam states that it recognizes a marriage according to the foreign law as long as it does not contradict its law. It mentions that the principle of monogamy, voluntary to enter into a marriage, and equality of legal protection to a marriage, either between non-believer, Vietnamese national or foreigner. It requires that at least those three principles, namely the principle of monogamy, voluntary and equal protection, are applied.

The limitation of each of ASEAN Member States is different from one to another. In general, it is mentioned that a marriage solemnized abroad shall be registered if it has does not contradict *lex fori.* However, there are some ASEAN Member States stating that some principles must be followed and override the law which should initially be

[1027] Art. 47 of the Lao PDR's Marriage Law.

[1028] Art. 5 of the Thailand's Conflict of Laws Act. *"5. Whenever a law of a foreign country is to govern, it shall apply in so far as it is not contrary to the public order or good morals of Thailand."*

applied. Lao PDR, Myanmar, the Philippines, and Vietnam mention their limitations certainly with requirements that cannot be violated.

Whether or not such particular requirements are included in the public policy or mandatory rules, it is not an easy answer. The problem of determining the applicable public policy and mandatory rules is always an issue, in PIL everywhere. The question is: which public policy or mandatory rules (related to the case) are binding and must be applied as the public policy or mandatory rules of the marriage.

Public policy is always a trending topic in PIL. It is one of the pillars of PIL, in addition to the principles of nationality and choice of law. The public policy provides that when a foreign law has been chosen as the applicable law and conflicts with the fundamental principles and good moral values, the application of that foreign law can be prevented; therefore, *lex fori* or the law of judge shall be applied in the case in question. Public order must be used as an 'emergency measure' or an *ultimum remidium*. It must only apply to an unavoidable situation and when the application of a foreign law is a manifestation which is incompatible with the fundamental principles.

The principles above, which are mentioned in particular to supersede the initial applicable law, are legitimate and example that overriding "mandatory rules" and "public policy" vary from one legal system to another. The reason is multifold between cultural, historical, and political classification to specify as to whether or not the requirements including "mandatory rules" or "public policy" have to be perceived in a specific legal context.

Nevertheless, it does not mean that no common feature of "mandatory rules" and "public policy" can be found across legal systems. "Mandatory rules" are defined as specific rules designed to protect specific and overriding interests which demand immediate application to whatever cases falling within their scope. "Public policy" is a device which aims to safeguard the fundamental values and principles of its forum, and which has the effect of excluding the application of a foreign law that would have otherwise been applied.

The "mandatory rules" are always connected with public and economical aspects. In explaining "mandatory rules", export-import regulation or labor law is stated and serves as example. Another example is the applicable law in the franchise law. In Indonesia, the relevant prevailing regulation mentions that the Indonesian law is the governing law of franchise contracts, even though both parties agree to choose otherwise.[1029] In this

[1029] Art. 4 (1) of Government Regulation No. 42 of 227 regarding Franchise. *"(1) Waralaba diselenggarakan berdasarkan perjanjian tertulis antar Pemberi Waralaba dengan Penerima Waralaba dengan memperhatikan hukum Indonesia."* Translation: (1) Franchise shall be implemented based on a written contract between the Franchisor and Franchisee by taking into account the Indonesian law. In its implementing regulation,

regulation, the government aims to protect the Indonesian franchisee which is classified as micro or small enterprises. The other example is the employment agreement which is an exercise within Indonesia. The labor law mentions that an employment agreement may not be contradicted in any event. In the event of any contradicting provision in the employment agreement, stipulation of the Indonesian labor law shall be applied. In this regard, the government would like to protect the labor. In fact, rules are overridingly mandatory, as their application is crucial for safeguarding the political and economic interests of the forum. In the instances above, in terms of legal effects of the mandatory rules (as far as choice of law is concerned), overriding mandatory rules directly replace the otherwise applicable law. The Indonesian law is applied in this matter.

The public policy is mentioned in the decision of the Supreme Court. It is a famous case, namely the inter-faith mixed marriage case.[1030] The supreme court stated that Indonesia according to MA 1974 should exercise GHR in allowing a couple to marry. However, GHR cannot be applied as the foundation laid down in such regulation is not in line with the first *sila* of *Pancasila*. The first *sila* mentions that the foundation of Indonesia is the Almighty God. Therefore, though GHR stipulates an inter-faith mixed marriage, it cannot be applied to marrying couple. In this case, the Supreme Court mentioned the overriding application of GHR, as it contradicts the Indonesian public policy. The Supreme Court superseded GHR in order to protect the fundamental principle of Indonesia, as described in *Pancasila*. *Pancasila* is the basic principle and the source of all legal sources in Indonesia. In this case of "public policy" device aiming to safeguard the fundamental values and principles of its forum, it has the effect of excluding the application of GHR, though the result is the same whereby the couple is married according to the husband's law.

In the examples above, in terms of legal effects (as far as choice of law is concerned), "overriding mandatory rules" directly replace the otherwise applicable law. The public policy merely rejects the application of the otherwise applicable law without the designation of another applicable law.

In common practice or in general, the result of excluding the *lex causae* by way of public policy will nearly always lead to the application of the *lex fori*. Thus, overriding "mandatory rules" serves as a sword in that it has positive effect (of demanding

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it is firmly and well defined that the governing law of franchise agreement must be Indonesian law. Art. 5(1) of Minister Regulation No. 31 of 2008 regarding Franchise. *"(1) Waralaba diselenggarakan berdasarkan perjanjian tertulis antara Pemberi Waralaba dan Penerima Waralaba dan mempunyai kedudukan hukum yang setara dan terhadap mereka berlaku Hukum Indonesia."* Translation: (1) Franchise shall be implemented based on a written agreement between the Franchisor and Franchisee and have equal legal position and to them, the Indonesian law shall apply.

[1030] A Case of Andy Vonny Gany (Moslem) vs. Petrus Nelwan (Christian). (Court Decision of Central Jakarta No. 382/PDT/P/1986/PN.JKT.PST. dated April 11, 1986 *jo*. Decision of the Supreme Court of RI No. 1400 K/PDT/1986 dated January 29, 1989. See the complete case in Sub-chapter 5.2 of Chapter 3 of this writing.

application), whereas "public policy" serves as a shield in that it has negative effect (of excluding application).

In relation to legal effect, the limitation of the above seems to protect a specific legal interest, for instance, the principles of monogamy and voluntary. However, these seem fall within the public policy device, instead of mandatory rules device. According to the author, this application does not require any mandatory rule as the aim is to protect the general yet basic value of marriage.

The aim is to protect the crucial and fundamental philosophies of marriage. Although, there are some opinions saying that in terms of scope of application, both devices may sometimes overlap (the frequency and rarity of such situation vary from one country to another), there are cases which fall within the scope of mandatory rule but does not trigger the public policy device. It is the case where the specific legal interests are considered to be so fundamental as to be part of the public policy, instead of given the mandatory rule. In addition, in this case, public policy is invoked to exclude the (foreign) law in order to apply the law of the forum, whereby no mandatory rule is in place to demand application.

4 International Conventions with respect to a Marriage

There are several international conventions providing for the stipulation with respect to a marriage, particularly the right to marry as one of the human rights. The international conventions come from international organizations known for handling either public area or private area. Elaborating each convention will not be the case in this writing. Therefore, the author will only mention the convention to which one or some of ASEAN Member States are the contracting states or member states.

4.1 United Nations

4.1.1 Universal Declaration of Human Rights

The Convention of Universal Declaration of Human Rights was adopted and proclaimed by the United Nations General Assembly Resolution on December 10, 1948.[1031] In this convention, the right to marry is provided in Art. 16.[1032] It states that men and women of full age, without any limitation due to race, nationality or religion, have the right to

[1031] United Nations General Assembly, *Universal Declaration of Human Rights*, December 10, 1948, 217 A (III), available at: http://www.refworld.org/docid/3ae6b3712c.html, last accessed on July 25, 2017.

[1032] Art. 16 of the Universal Declaration of Human Rights. *"(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (2) Marriage shall be entered into only with the free full consent of the intending spouses. (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."*

marry and found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. Further, it states that a marriage shall be entered into with the free and full consent of the intending spouses.

All of the ASEAN Member States are parties to this convention.[1033] In addition, this convention is the backgrounds of ASEAN for having the Bangkok Declaration in 1993 (Chapter 4.2.2.1).

4.1.2 Convention Related to the Status of Refugees

Grounded in Article 14 of the Universal Declaration of Human Rights 1948,[1034] this convention was adopted on July 28, 1951, by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly Resolution 429 (v) of December 14, 1950, entered into force on April 22, 1954.[1035] This convention becomes the centerpiece of the international refugee protection today.

Refugee is defined as someone who is unable or unwillingly to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or a political opinion.[1036]

This convention provides the stipulations of the right to marry of the refugees in Art. 12.[1037] In general, the personal status of a refugee shall be governed by the law of the

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[1033] See the official website of the United Nations, available at: http://www.un.org/en/member-states/index.html, last accessed on July 25, 2017. The date of admission of the ASEAN Member States: Brunei Darussalam (September 21, 1984), Cambodia (December 14, 1955), Indonesia (September 28, 1950), Lao PDR (December 14, 1955), Malaysia (September 17, 1957), Myanmar (April 19, 1948), the Philippines (December 24, 1945), Thailand (December 16, 1946), and Vietnam (September 20, 1977).

[1034] Art. 14 of the Universal Declaration of Human Rights. *"(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution (2) This right may not be invoked in the case of prosecution genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."*

[1035] United Nations General Assembly Resolution 429(V), *Convention Relating to the Status of Refugees of December 14, 1950*, available at http://www.unhcr.org/refworld/docid/3b00f08a27.html, last accessed on July 25, 2017.

[1036] Art. 1.A paragraph 2 of the Convention Relating to the Status of Refugees. *"2. As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having nationality and being outside of the country of his former habitual residence as a result of such events, is unable, or, owing to such fear, is unwilling to return it. In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."*

[1037] Art. 12 of the Convention Relating to the Status of Refugees. *"(1) The personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence. (2) Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary,*

country of his domicile or, if he/she has no domicile, by the law of the country of his residence. Refugees' rights previously acquired and dependent on the personal status, in particular the rights attached to a marriage, shall be respected by a Contracting State, subject to compliance, if it is necessary, the formalities required by the law of the State, provided that the right in question is one which would have been recognized by the law of that State had he/she is not a refugee.

The ASEAN Member States which become the Contracting States to this Convention and Protocol are Cambodia and the Philippines.[1038] As of 2017, there are 145 contracting states to this convention and 146 contracting states to the Protocol.

4.1.3 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery

This convention has the Universal Declaration as its bedrock and it was adopted by a conference of Plenipotentiaries convened by Economic and Social Council Resolution 608 (XXI) of April 30, 1956 and done at Geneva on September 7, 1956, entered into force on April 30, 1957.[1039] Hereinafter, this Convention shall be referred to as the "**Supplementary Convention of the Abolition of Slavery**".

According to this convention, the States Parties shall take all practicable and necessary measures to bring about progressively and as soon as possible the complete abandonment of the following institutions and practices whereby: (i) a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or (ii) the husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or (iii) a woman on the death of her husband is liable to be inherited by another person.[1040] In relation to end such institutions and

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with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of the State had he not become a refugee."

[1038] See the official website of the United Nations, available at: https://treaties.un.org/PAGES/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&clang=_en, last accessed on July 25, 2017. Cambodia accessed on October 15, 1992 and the Philippines accessed on July 22, 1981.

[1039] United Nations, United Nations Economic and Social Council (ECOSOC), *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, September 7, 1956 available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/SupplementaryConventionAbolitionOfSlavery.aspx, or http://www.refworld.org/docid/58c156dc4.html, last accessed on July 25, 2017.

[1040] Art. 1 para. (c) of the Supplementary Convention of the Abolition of Slavery. *"Each of the State Parties to this Convention shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices, where they still exist and whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention signed at Geneva on 25 September 1926: … (c) Any institution or practice whereby: (i) a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or (ii) the husband of a woman,*

practices, the States Parties shall undertake to prescribe, the suitable minimum ages of marriage, to encourage the use of facilities whereby the consent of both parties to a marriage may be freely expressed in the presence of a competent civil or religious authority, and to encourage the registration of marriage.[1041]

In addition, the States Parties will proscribe any institution or practice whereby a child or young person under the age of 18 years old, is delivered by either or both of his biological parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labor.[1042]

As of July 2017, there were 123 member states to this convention and the ASEAN States Members which are the parties to this convention are Cambodia, Lao PDR, Malaysia, the Philippines and Singapore.[1043]

4.1.4 Convention on the Nationality of Married Women

This Convention was agreed upon in the United Nation General Assembly resolution on February 20, 1957 and entered into force on August 11, 1958.[1044] Hereinafter, this Convention shall be referred to as the "**Convention on the Nationality of Married Women**".

Before this convention, no legislation existed to protect married women's right to retain or renounce national citizenship in a way that men can. This convention was concluded in the light of the conflict of law on nationality derived from provisions on the loss or acquisition of nationality by women as a result of marriage, divorce, or of the change of

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his family, or his clan, has the right to transfer her to another person for value received or otherwise; or (iii) a woman on the death of her husband is liable to be inherited by another person.

[1041] Art. 2 of the Supplementary Convention of the Abolition of Slavery. *"With a view to bringing to an end the institutions and practices mentioned in article 1 (c) of this Convention, the State Parties undertake to prescribe, where appropriate, suitable minimum ages of marriage, to encourage to use of facilities whereby the consent of both parties to a marriage may be freely expressed in the presence of a competent civil or religious authority, and to encourage the registration of marriage."*

[1042] Art. 1 para. (d) of the Supplementary Convention of the Abolition of Slavery. *"Each of the State Parties to this Convention shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices, where they still exist and whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention signed at Geneva on 25 September 1926: … (d) proscribes any institution or practise whereby a child or young person under the age 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour."*

[1043] See the official website of the United Nations to this convention available at: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XVIII-4&chapter=18&Temp=mtdsg3&clang=_en, last accessed on July 25, 2017. The date of admission of those ASEAN Member States are: Cambodia (June 12, 1957), Lao PDR (September 9, 1957), Malaysia (November 18, 1957), the Philippines (November 15, 1964) and Singapore (March 28, 1972).

[1044] United Nations General Assembly, *Convention on the Nationality of Married Women* New York February 20, 1957, available at https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XVI-2&chapter=16&Temp=mtdsg3&clang=_en, last accessed on July 25, 2017.

nationality by the husband during a marriage. It allows women to adopt the nationality of their husband based upon the women's own decision, but does not require it.

The convention seeks to fulfill aspirations articulated in Art. 15 of the Universal Declaration of Human Rights that everyone has a right to a nationality and no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.[1045] The convention provides the stipulations, among others, that each of the Contracting States agrees that neither the celebration nor the dissolution of a marriage between one of its nationals and an alien, nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife.[1046] In addition, each Contracting State agrees that neither the voluntary acquisition of the nationality of another State nor the renunciation of its nationality by one of its nationals shall prevent the retention of its nationality by the wife of such national. [1047] Each of Contracting States agrees an alien wife of one of its nationals may, at her request and not automatically, acquire the nationality of her husband through specially privileged naturalization procedures. The grant of nationality may be subject to the limitations as may be imposed in the interests of national security or public policy of the Contracting States. This Convention shall not be construed as affecting any legislation or judicial practice by which an alien wife of one national may acquire her husband's nationality at her request, as a matter of right.[1048]

The convention is ratified by 74 states, and it has been denounced by the ratifying states Luxembourg, the Netherlands and the United Kingdom. The ASEAN Member States which are parties to this convention are Cambodia which signed it on November 11, 2001, and Malaysia which acceded to it on February 24, 1959.[1049]

[1045] Art. 15 of the Universal Declaration of Human Rights. *"(1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."*

[1046] Art. 1 of the Convention on the Nationality of Married Women. *"Each of Contracting States agrees that neither the celebration nor the dissolution of a marriage between one of its nationals and an alien, nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife."*

[1047] Art. 2 of the Convention on the Nationality of Married Women. *"Each Contracting State agrees that neither the voluntary acquisition of the nationality of another State nor the renunciation of its nationality by one of its nationals shall prevent the retention of its nationality by the wife of such national."*

[1048] Art. 3 of the Convention on the Nationality of Married Women. *"(1) Each Contracting State agrees the alien wife of one of its nationals may, at her request, acquire the nationality of her husband through specially privileged naturalization procedures; the grant of such nationality may be subject to the limitations as may be imposed in the interests of national security or public policy. (2) Each Contracting State agrees that the present Convention shall not be construed as affecting any legislation or judicial practice by which the alien wife of one national may acquire her husband's nationality at her request, as a matter of right."*

[1049] United Nations General Assembly, *Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages*, available at https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XVI-2&chapter=16&Temp=mtdsg3&clang=_en, last accessed on July 25, 2017.

4.1.5 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages

The Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages is a treaty agreed upon in the United Nations on the standards of marriage. It was opened for signature and ratification by General Assembly resolution 1763A (XVII) of November 7, 1962, and entered into force on December 9, 1964.[1050] Hereinafter referred to as the "**Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages**".

The convention contains the recalling Art. 16 of the Universal Declaration of Human Rights stating that men and women of full age have the right to marry and to found a family, without any limitation due to race, nationality or religion.[1051] They are entitled to equal right to marry, during marriage and at its dissolution. By taking into account that certain customs, ancient laws and practices relating to marriage and the family are inconsistent with the principles described in the Charter of United Nations and the Universal Declaration of Human Rights, this convention was conveyed. It also recalls that a marriage shall be entered into only with the free and full consent of the intending spouse. The reaffirming states should take all appropriate measures with a view to abolishing customs, ancient laws and practices by ensuring, inter alia, complete freedom in the choice of a spouse, completely eliminating child marriages and the betrothal of young girls before the age of puberty, establishing appropriate penalties where necessary and establishing a civil or register in which all marriages will be recorded.[1052]

The convention stipulates that no marriage shall be legally entered into without the full and free consent of both parties. The consent must be expressed by each of the couple in person after due publicity and in the presence of the authority which is competent to solemnize the marriage and credible witnesses. The couple is allowed not to be present before the competent authority, provided that he or she fulfills two requirements. First, the competent authority is satisfied with the reason for such exceptional circumstance; and second, the party has expressed and has not withdrawn her/his consent to marry

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[1050] United Nations General Assembly, *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* New York January 20, 1957, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVI-3&chapter=16&clang=_en , last accessed on July 25, 2017.

[1051] The Preamble para. 3 of the Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages. Art. 16 of the Universal Declaration of Human Rights. *"(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (2) Marriage shall be entered into only with the free full consent of the intending spouses. (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."*

[1052] The Preamble para. 4, 5 of the Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages.

before the competent authority.[1053] This stipulation is about to avoid an arranged marriage that usually happens without the consent of the couple, either from both of them or one of them.

The States Parties to the convention shall take a legislative action to provide for the minimum age for marriage. Due to the practice of child marriage that exists, this stipulation is about to avoid child marriage. Any dispensation or exception can be made by the competent authority, for critical reasons due to the interest of the intending spouses.[1054] The last commitment is about the marriage registration as stipulated in Art. 3 of the convention; it is stated that all marriages must be registered in an appropriate official registration held by the competent authority.[1055]

The Convention has been signed by 16 States and there are 55 parties to the Convention. From ASEAN Member States, the Philippines is the only Contracting State to the convention, which signed it on February 5, 1963 and ratified it on January 21, 1965.[1056] It ratified the convention with reservation that, considering its Civil Code, the Philippines interprets the second paragraph of Art. 1,[1057] as not imposing the Philippines to allow marriage with any proxy on exceptional circumstances within its territory if such manner of marriage is not authorized by the law of the Philippines. Rather, the solemnization within the territory of the Philippine of a marriage in absence of one of the parties under the conditions of the stated paragraph will be permitted only if so allowed by the Philippine law.

[1053] Art. 1 of Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages. *"(1) No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law. (2) Notwithstanding anything in paragraph 1 above, it shall not be necessary for one of the parties to be present when the competent authority is satisfied that the circumstances are exceptional and that the party, has before a competent authority and in such manner as may be prescribed by law, expressed and not withdrawn consent."*

[1054] Art. 2 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages. *"States parties to the present Convention shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses."*

[1055] Art. 3 of Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages. *"3. All marriages shall be registered in an appropriate official register by the competent authority."*

[1056] United Nations, United Nations Economic and Social Council (ECOSOC), the List of Signatories and Parties to the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVI-3&chapter=16&clang=_en , last accessed on July 25, 2017.

[1057] Art. 1 para. (2) of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages. "*(2) Notwithstanding anything in paragraph 1 above, it shall not be necessary for one of the parties to be present when the competent authority is satisfied that the circumstances are exceptional and that the party, has before a competent authority and in such manner as may be prescribed by law, expressed and not withdrawn consent.*"

4.1.6 International Convention on the Elimination of All Forms of Racial Discrimination

This convention was adopted by the General Assembly of the United Nations as resolution 2016 XX on December 21, 1965 and entered into force on January 4, 1969.[1058] Hereinafter, it is referred to as the "**ICERD**".

ICERD consists of three parts, the commitments of the States Parties to eliminate all forms of racial discrimination and to promoting understanding among all races. The States Parties are obligated not to discriminate on the basis of race, not to sponsor or defend racism, and to prohibit racial discrimination within their jurisdiction. On the previous basis, the States Parties must review their laws and policies to ensure that they do not discriminate on the basis of race, and commit to amending or repealing theirs. The specific areas in which discrimination must be eliminated are listed in Art. 5 (iv), and the States Parties undertake to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of the right to marriage and choice of spouse.[1059]

Slightly different from the previous conventions, the right to marriage -which is usually attached to the free consent from the spouse and minimum age, is attached to the choice of spouse. This convention does not give any limit whether or not it has to be the opposite sex.

ICERD has 88 States Signatories and 175 States Parties. From the ASEAN Member States, Cambodia, Indonesia, Lao PDR, the Philippines, Singapore, Thailand and Vietnam are the States Parties to ICERD,[1060] while Brunei, Malaysia and Myanmar are otherwise.

[1058] United Nations General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination* on December 21, 1965, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en, last accessed on July 25, 2017.

[1059] Art. 5 (v) of ICERD. *"In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: … (d) Other civil rights, in particular; … (iv) The right to marriage and choice of spouse; …"*

[1060] Cambodia signed it on April 12, 1966, Indonesia acceded to it on June 25, 1999, Lao PDR acceded to it on February 22, 1974, the Philippines signed it on March 7, 1966, Singapore signed it on October 9, 2015, Thailand acceded to it on January 28, 2003 and Vietnam acceded to it on June 9, 1982.

4.1.7 International Covenant on Economic, Social and Cultural Rights

This convention was adopted by the General Assembly of the United Nations on December 16, 1966 and entered into force on January 3, 1976.[1061] Hereinafter, it is referred to as the "**ICESCR**".

ICESCR commits its parties to work toward the granting of economic, social, and cultural rights (ESCR) to the Non-Self-Governing and Trust Territories and individuals, including labor rights and the right to education, and the right to an adequate standard of living. ICESCR consists of five parts. The first part recognizes the right of all peoples to self-determination, including the right to "freely determine their political status", pursue their economic, social and cultural goals, and manage and dispose of their own resources. The second part is about the principles of progressive realization. It requires rights to be recognized without discrimination of any kind as to race, color, sex, language, religion, political or another opinion, national or social origin, property birth or another status. The third part is the list of rights, whereby the right to marriage is included. The fourth part governs the report and monitoring of covenants and steps taken by the parties to ICESCR. The last part is about ratification, entry into force an amendment to the covenants.[1062]

The provisions on marriage state that a marriage must be entered into with the free and full consent of the intending spouses. ICESCR recognizes that a family is the natural and fundamental group unit of society, therefore it requires its parties to accord their widest possible protection and assistance to ensure that their citizens are free to establish families and that a marriage is freely contracted and there is no forced marriage.[1063]

ICESCR has 71 State Signatories and 165 States Parties. From the ASEAN Member States, Cambodia, Indonesia, Lao PDR, the Philippines, Thailand and Vietnam are the States Parties to ICESCR.[1064]

[1061] United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights* on 16 December 1966, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en, last accessed on July 25, 2017.

[1062] The first part consists of Art. 1, the second part consists of Art. 2-5 of ICESCR, the third part consists of Art. 6-15, the fourth part consists of Art. 16-25, and the last part consists of Art. 26-31.

[1063] Art. 10 (1) of ICESCR. *"The State Parties to the present Convention recognize that: (1) The widest possible protection and assistance should be accordance to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses."*

[1064] See the list of parties to the convention at the official website of United Nations available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en, last accessed on July 25, 2017. Cambodia signed it on October 17, 1980 and acceded to it on May 26, 1992, Lao PDR signed it on December 7, 2000 and acceded to it on February 13, 2007, the Philippines signed it on December 19, 1966 and acceded to it on June 7, 1974, Thailand acceded to it on September 5, 1999 and Vietnam acceded to it on September 24, 1982. Myanmar signed the Convention, but did not ratify it.

The optional Protocol to the ICESCR is a side-agreement to the covenant which allows its parties to recognize the competence of the Committee on Economic Social and Cultural Rights to consider complaints from individuals. This optional protocol has 45 signatories and 22 states parties. This optional protocol entered into force on May 5, 2013.[1065] None of the ASEAN Member states is involved in this protocol.

4.1.8 International Covenant on Civil and Political Rights

This convention was adopted as a treaty by General Assembly of the United Nations with resolution 2200A (XXI) on December 16, 1966 and entered into force on March 23, 1976, hereinafter referred to as the "**ICCPR**".[1066]

ICCPR comprises of six parts. The first part consists of the recognition of rights of all peoples to self-determination, including the right to freely determine their political status, pursue their economic, social and cultural development. All people may freely dispose of their own natural wealth and resources based upon the principle of mutual benefit, and international law, without prejudice to any obligation arising out of international economic cooperation. The second part is the covenants of the States Parties to undertake, to legislate when necessary, to respect and to ensure them for all individuals within their territory and subject to their jurisdiction, without any distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property birth or any other status. The rights can only be limited in time of public emergency which threatens the life of the nation and even then, no derogation is permitted from the rights to life, freedom from torture and slavery, the freedom from the retrospective law, the right to personhood and freedom of thought, conscience and religion. The third part is the list of protected rights, among other, the right to physical integrity, the rights to liberty and security of person, rights to justice and fair trial, the freedom of movement, freedom of religion or belief, and political rights. The fourth part governs the establishment and operation of the Human Rights Committee and reporting as well as monitoring of the covenants. This part also includes dispute resolution between parties on the implementation of ICCPR.[1067]

[1065] United Nations General Assembly, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&clang=_en, last accessed on July 27, 2017. See Art. 1 (1) of the Optional Protocol to ICESCR. *"A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications as provided for by the provisions of the present Protocol."*

[1066] United Nations General Assembly, *International Covenant on Civil and Political Rights* on December 16, 1966, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en, last accessed on July 27, 2017.

[1067] The first part consists of Art. 1. The second part consists of Art. 2-5, the third part consists of Art. 6-27, the fourth part consists of Art. 28-45 and the last part consists of Art. 46-47.

In relation to marriage, ICCPR acknowledges that a family is the natural and fundamental group unit of society and is entitled to protection by society and the states. It states that the right of men and women of marriageable age to marry and to found a family shall be recognized. No marriage shall be entered into without free and full consent of the intending spouses. The States Parties to ICCPR shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during the marriage and at its dissolution. In addition, provisions to protect any children subsequent to marriage dissolution shall be made as well.[1068]

ICCPR has 74 State Signatories and 169 States Parties. From the ASEAN Member States, Cambodia, Indonesia, Lao PDR, the Philippines, Thailand and Vietnam are the States Parties to ICCPR.[1069]

There are two Optional Protocols to ICCPR. The first Optional Protocol of ICCPR [1070] establishes an individual complaint mechanism allowing individuals to complain to the Human Rights Committee about violations of ICCPR.[1071] There are 35 signatories and 116 states parties to this first protocol. From the ASEAN Member States, Cambodia and the Philippines are involved in this protocol.[1072]

The second Optional Protocol of ICCPR[1073] abolishes the death penalty; however, the states are permitted to make reservation allowing due to the most serious crimes of a military nature, committed during wartime.[1074] There are 37 signatories and 84 states

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[1068] Art. 23 of ICCPR. *"(1) The family is the natural and fundamental group if society and is entitled to protection by society and the State. (2) The right of men and women of marriageable age to marry and to found a family shall be recognized. (3) No marriage shall be entered into without the free and full consent of the intending spouses. (4) States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children."*

[1069] See the list of parties to the convention available at the official website of United Nations: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en, last accessed on July 27, 2017.

[1070] United Nations General Assembly, *Optional Protocol of the International Covenant on Civil and Political Rights*, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&clang=_en, last accessed on July 27, 2017.

[1071] Art. 1 of the Optional of ICCPR. *"A State Party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victim of a communication shall be received by the Committee if it concerns a state Party to the Covenant which is not a party to the present Protocol."*

[1072] See the list of parties to the convention available at the official website of United Nations: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&clang=_en, last accessed on July 27, 2017. Cambodia signed this protocol on September 22, 2004, and the Philippines signed it on December 19, 1966 and ratified it on August 22, 1989.

[1073] United Nations General Assembly, *Second Optional Protocol of the International Covenant on Civil and Political Rights, aiming at the abolishment of the death penalty*, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-12&chapter=4&clang=_en, last accessed on July 27, 2017.

[1074] The Art. 1, 2 of the Second Protocol of ICCPR. *"Art. 1. (1) No one within the jurisdiction of a State Party to the resent Protocol shall be execute. (2) Each State Party shall take all necessary measures to abolish*

parties to this first protocol. From the ASEAN Member States, only the Philippines is involved in this protocol.[1075]

4.1.9 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

This convention was adopted by the General Assembly of United Nations on December 18, 1979 and entered into force on September 3, 1981. Hereinafter, it is referred to as the "**CEDAW**".[1076]

CEDAW reaffirms faith in fundamental human rights, human dignity and worth, equal rights of men and women, and inadmissibility principle of discrimination as well as proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all rights and freedoms without distinction of any kind, including distinction based on sex. CEDAW acknowledges that women give great contributions to family welfare and society development, social significance of maternity, and role of both parents in a family as well as child upbringing, and is aware that women's role in procreation should not be the basis for discrimination, but that child upbringing requires sharing of responsibility between men and women and the society as a whole. This convention also acknowledges that the traditional role of men and women in the society and family needs to change in order to achieve full equality between men and women.[1077]

The provision states that States Parties shall grant women rights equal to men to acquire, change or retain their nationality, as well as the nationality of their children. They shall ensure in particular that neither marriage to an alien nor change of nationality by a husband during a marriage shall automatically change the wife's nationality, render her stateless or force upon her the husband's nationality.[1078]

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the death penalty within its jurisdiction. Art. 2. (1) No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in the time of war pursuant to a conviction for a most serious crime of a military nature committed during war time. (2) The State Party making such a reservation shall at the time of ratification or accession communicate to the Secretary-General of the United States Nations the relevant provisions of its national legislation applicable during wartime."

[1075] See the list of parties to the convention available at the official website of United Nations: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-12&chapter=4&clang=_en, last accessed on July 27, 2017. The Philippines signed it on December 20, 2006 and ratified it on November 20, 2007.

[1076] United Nations General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en, last accessed on July 27, 2017.

[1077] The Preamble para. 2, 3, 14 and 15 of CEDAW.

[1078] Art. 9 of CEDAW. *"(1) States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or*

CEDAW stipulates that States Parties shall take all appropriate measures to eliminate discrimination against women in all matters related to marriage and family relations and in particular shall ensure, on a basis of equality of men and women, the same right to enter into a marriage, the same right to choose a spouse and to enter into a marriage only with their free and full consent, the same rights and responsibilities during a marriage and at its dissolution, the equal rights as parents, the same personal rights as husband and wife. It prevents any betrothal and marriage of a child by nullifying the same actions; and in addition, the States Parties shall take all necessary actions, including legislation, to specify the minimum age of marriage and to make registration of marriage in an official registry compulsory.[1079]

All of the ASEAN Member States are States Parties to CEDAW, and it is one of the reasons that ASEAN established ACWC (see Chapter 4.2.2).

4.1.10 Marriages from the UN Conventions

From the perspective above, a marriage has a closed relationship with human rights. The right to marry is one of human rights as described in the relevant conventions, among others, the Universal Declaration of Human Rights. In such declaration, a marriage is stated as the right of men and women of full age, without any limitation due to race, nationality or religion, who have the right to marry and found a family. They are entitled to equal rights as to marriage, during a marriage and at its dissolution. A marriage shall be entered into with the free and full consent of the intending spouses.

From the data of states parties and or signatories described above, it is evident that not every ASEAN Member State becomes a state party to the convention, save for the Universal Declaration of Human Rights and CEDAW. Cambodia and the Philippines are the most active states as they are involved in 8 out of 9 conventions. Brunei and

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force upon the nationality of the husband. (2) State Parties shall grant women equal rights with men with respect to the nationality of their children."

[1079] Art. 16 of CEDAW. *"(1) The States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) the same right to enter into marriage; (b) the same right freely to choose a spouse and to enter into marriage only with their free and full consent; (c) the same rights and responsibilities during marriage and at its dissolution; (d) The same right and responsibilities and parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount; (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights; (f) the same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount; (g) the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation; (h) the same right for both spouse in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration. (2) The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriage in an official registry compulsory."*

Myanmar are nethermost for being involved in only 2 out of 9 conventions. The rest, Indonesia, Laos, Malaysia, Singapore, Thailand and Vietnam are scattered in the middle of the preceding numbers.[1080]

The concept above in relation to human rights provokes international conventions with more specific purposes, for instance, right of children, right of labors and workers, etc. The preceding description of nine conventions about marriage and or right to marriage covers the following points:

1. A family is the natural and fundamental group unit of society. Therefore, it is entitled to be protected by the society and state.
2. Men and women of marriageable age have an equal right to marry and to found a family.
3. Full marriageable age prescribes:
    a. that any child marriage must be prohibited and the minimum age to marry shall be legislated.
    b. This prescribes any institution or practice whereby a child or young person under the age 18 years is delivered by either or both of his biological parents or by his/her guardian to another person, whether for reward or not, with a view to exploitation of the child or young person or of his/her labor.
    c. Any dispensation or exception of minimum age to marry can only be made by the competent authorities, for any critical reasons due to the interest of the intending spouses.
4. A marriage shall be entered into with the free and full consent of the intending spouses. This prescribes:
    a. that the consent of both parties to a marriage may be freely expressed in the presence of a competent civil or religious authority, and to encourage the registration of marriage;
    b. the prohibition against a woman who, without the right to refuse, is promised or given in a marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or the husband of a woman, his family, or his clan, against the right to transfer her to another person for value received or otherwise; or against a woman who on the death of her husband is liable to be inherited by another person.

[1080] Cambodia and the Philippine are involved in 8 conventions, Lao PDR in 6 conventions, Indonesia, Thailand and Vietnam in 5 conventions, Malaysia and Singapore in 2 conventions, and lastly, Brunei and Myanmar in 2 conventions.

c. The bride and groom have the same right to choose a spouse. The author understands this prescription as the freedom to consent to choose a spouse – to the contrary of any arranged marriage. It does not recommend nor prohibit (is not related to the issue of) the same-sex-marriage.

5. All marriages must be registered in appropriate official registration held by the competent authorities. If cannot be said as a must, it is strongly advised to be registered. The background is free and full consent. The consent must be expressed by each of the couples in person after due publicity and in the presence of an authority who is competent to solemnize a marriage and credible witnesses. The couple is allowed not to be present before the competent authority, provided that he or she fulfills two requirements. First, the competent authority is satisfied with the reason for such exceptional circumstance; and second, the party has expressed and has not withdrawn her/his consent to marry before the competent authority. It is to avoid an arranged marriage that usually happens without the consent of the couple, either from both of them or one of them.
6. The rights and responsibilities of spouses as to marriage, during a marriage and at its dissolution are the same.
7. Men and women have the same rights and responsibilities during a marriage and at its dissolution, equal rights as parents, same personal rights as husband and wife. This prescribes that:
    a. Married women adopt the nationality of their husband based on the their own decision, but they are not required to do so. Neither the celebration or dissolution of a marriage between one of its nationals and an alien, nor the change of nationality by the husband during a marriage, shall automatically affect the wife's nationality. Each Contracting State agrees that an alien wife of one of its nationals may, at her request and not automatically, acquire her husband's nationality through specially privileged naturalization procedures. The grant of the nationality may be subject to limitations as may be imposed in the interests of national security or public policy of the Contracting States.
    b. Married women have rights equal to men to acquire, change or retain their nationality, as well as their children's nationality.
8. In relation to refugees, a marriage is considered as personal status of a refugee that shall be governed by the law of the country of his/her domicile or, if he/she has no domicile, by the law of the country of his/her residence. A refugee's rights previously acquired and dependent on personal status, in particular, rights attached to a marriage, shall be respected by a Contracting State.

Those points, save for refugees, are covered and stipulated in CEDAW, to which all ASEAN Member States are States Parties. Therefore, it can be considered that the

ASEAN Member States have the same basic concept of marriage, despite that they are States Parties only to some Conventions.

4.2 Hague Convention on Private International Law

The Hague International Convention on Private International Law, hereinafter referred to as the "**HCCH**", was formed to work on progressive unification of PIL rules.[1081] Although it has the title of a conference, it is in fact a permanent institution.[1082] Membership in this Conference is stated in Art. 2. It defines the conditions for membership of other States, that the participation of the States in question should afford an interest of juridical nature for the work of the Conference; and that the majority of Member States should vote in favor of its admission.

The scope of the Hague Conferences is the divergence in the scope of which they portray. The sphere of operations of each Convention is determined by the particular need of the subject-matter with which it deals. In many conventions, there is an express reservation admitting the faculty for States not present at the Conferences, to sign and ratify the Convention in question.

There are several ASEAN Member States which are also the member states of the Hague Conventions, namely Malaysia, the Philippines, Singapore and Vietnam.[1083] The Connected States are Brunei, Cambodia and Thailand.[1084] The Connected State are states which are not a member of the Hague Conferences of Private International Law, but have signed or acceded to one or more of the Hague Conventions or are in the process

[1081] Art. 1 of the Statute. *"the purpose of the Hague Conference is to work for the progressive unification of the rues of private international law."*

[1082] The first conference was held in 1893, on the initiative of T.M.C. Asser and it became a permanent inter-governmental organization in 1955, upon the entry into force of its Statute.

[1083] **Malaysia** is a member state since October 2, 2002, yet it signs none of the conventions. **The Philippine** is a member state since July 14, 2010, and signed 2 conventions: (1) Convention of 25 Oct 1980 on the Civil Aspects of International Child Abduction; and (2) Convention of 29 May 1993 on Protection and Cooperation in respect of Intercountry Adoption. **Singapore** is a member state since April 19, 2014. It signed 3 conventions: (1) Convention of 18 March 1970 on the Taking Evidence Abroad in Civil or Commercial Matters; (2) Convention of 25 October 1980 on the Civil Aspects of International Child Abduction; (3) Convention of 30 June 2005 on Choice of Court Agreements. The last one is **Vietnam** which became a member state since April 10, 2013. It signed 2 conventions: (1) Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters; (2) Conv. Of 29 May 1993 on Protection and Cooperation in respect of Intercountry Adoption. See the official website of HCCH Members, available at https://www.hcch.net/en/states/hcch-members , last accessed on February 13, 2017.

[1084] **Brunei Darussalam** is bound by 2 conventions: (1) Conv. Of 5 October 1961 the Conflict of Laws relating the Form of Testamentary Dispositions; and (2) Conv. Of 5 Oct 1961 on Abolishing the Requirement of Legalisation for Public Documents. **Cambodia** is bound by (2) Conv. Of 29 May 1993 on Protection and Cooperation in respect of Intercountry Adoption. **Thailand** is bound by 2 conventions: (1) Conv. Of 25 October 1980 on the Civil Aspects of International Child Abduction; and (2) Conv. Of 29 May 1993 on Protection and Cooperation in respect of Intercountry Adoption. See: HCCH Other Connected States available at its official website https://www.hcch.net/en/states/other-connected-states , last accessed on February 13, 2017.

of becoming a member. Indonesia is an observer to these conventions and signs none of the conventions of Hague Conferences of Private International Law.[1085]

HCCH has produced conventions in relation to family matters, among others, maintenance, intercountry adoption, minor or children protection, or succession. The conventions are based on its objectives, namely the progressive unification of PIL rules. The hope is not yet fulfilled, as one can perceive the conventions and made a compromise and provide for the needs of all interested State.

There are two conventions of HCCH which are related to marriage. The first one is the Hague Marriage Convention of 12 June 1902 on the Law Applicable to Marriage. The second one is the Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages.

4.2.1 Hague Convention of 12 June 1902 on the Law Applicable to Marriage

The Hague Marriage Convention of 12 June 1902 on the Law Applicable to Marriage (hereinafter referred to as the "**Hague Marriage Convention 1902**").

According to this convention, the capability to marry of a person is determined by his/her national law.[1086] This convention has a principal rule that the capacity to marry depends on the law of the pre-marital nationality of each of the parties. A foreign party or parties who wish to marry in a Contracting State have to prove that they possess the capacity to marry in a Contracting State to the other by producing a certificate of capacity to marry from the diplomatic or consular representative of their national State.[1087] Only if prohibition is based on a religious ground, it is open to the place of celebration to ignore that restriction. However, in that case, it is equally open to other States, not only that of the nationality concerned, to deny recognition of the marriage.[1088] The celebration of marriage is subject to the law of place where the marriage takes place.[1089] This convention was designed to deal with the problem of fraudulence of law (*penyelundupan hukum*), rather than combating the limp marriage or establish a favor to marriage establishment.[1090]

[1085] Indonesia used to consider joining in two conventions of HCCH, the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, and the Convention on the Taking of Evidence Abroad in Civil Commercial Matters. The considerations are described in the Final Report to the Department of Law and Human Rights of the Republic of Indonesia of 2009. However, as far as the author is concerned, there is no further action taken to the above Final Report.

[1086] The Hague Marriage Convention of 12 June 1902 on the Law Applicable to Marriage, Art. 1.

[1087] *Ibid.,* Art. 4.

[1088] *Ibid.,* Art. 3.

[1089] *Ibid.,* Art. 5.

[1090] Peter Nygh, *The Hague Marriage Convention – A Sleeping Beauty?,* A. Borras et al (eds.), at E Pluribus Unum, (The Netherlands: Kluwer Law International: 1996), pp. 253-267.

A convention granting a right of veto over marriage to the State of nationality was unacceptable to common law countries which fall within the ambit of the new Hague Conference after 1955. Not only did they apply the more flexible concept of domicile, but the Anglo-Commonwealth concept of "formality marriage" was broader that of the civil law, notably in relation to parental consent.[1091] In the United States, reference is primarily to the law of the place of celebration, rather than any personal law of the parties, unless the marriage was evasive of a strong policy of the domiciliary state.[1092]

The post-World War II withdrawals from the Convention showed, even among civilians, the rigid insistence on the nationality principle became difficult to justify in an era of increased mobility. The disabilities imposed, notably, by German in the period before 1914 on men who had not fulfilled their national service obligations and by German and Italy in 1930's on marriages between persons of Jewish descendant and so-called "Aryans" made the operation of the Convention at times unconscionable. Therefore, a new convention was designed to overcome those defects.[1093]

4.2.2 Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages

The Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages (herein referred to as the "**Hague Marriage Convention**"), is a multilateral treaty developed by the HCCH. It replaced the earlier convention, the Hague Marriage Convention 1902.

This convention provides the recognition of marriage solemnized in one state in other states parties. This convention was signed in 1987 by Portugal, Luxembourg and Egypt and later by Australia, Finland and the Netherlands (for European territory only). It entered into force more than 10 years after its opening for signature, after ratification by Australia, the Netherlands and Luxembourg. Thereafter, no country has acceded to such convention.

The Hague Marriage Convention may be seen as the implementation of Art. 23 of the United Nations International Covenant on Civil and Political Rights (see sub-chapter

[1091] *Ibid.*
[1092] *Ibid.*
[1093] *Ibid.*

6.4.1.8),[1094] in particular, the cross-border situation.[1095] The UN convention recognizes the right of marriage of men and women of marriageable age in the foreground, based on the free and full consent of the intending spouses.

To overcome the obstacles of the Hague Marriage Convention 1902, the Hague Marriage Convention abandons the principle of nationality as the primary principle and made the law of the place of celebration the first reference. The authorities need only consult their own law in most cases involving a foreign marriage partner; as regard with recognition, they need only accept a certificate of marriage issued by a competent authority in the place of celebration and check whether the marriage against certain basic and common principles as embodied in the United Nations Conventions on Consent, Minimum Age and Registration of Marriage (See Chapter 4.1.5).

In relation to such provisions, the Hague Marriage Convention does two things. First, it facilitates celebration across national borders and second, it ensures the recognition of the validity of marriages across national borders. The first one is described in Part I of the Convention which deals with the celebration of marriage, and the second one is described in Part II with the recognition of foreign marriages.

4.2.2.1 Celebration of Marriage

The First Part, with respect to celebration of marriage, makes the law of the place of celebration or *lex loci celecrationis,* as the primary reference. This applies to the formal requirements of marriage, formalities, witnesses, etc.[1096] This application can be expanded to the material or substantive requirements of marriage. It is in accordance with the approach taken by some countries, in particular, immigration countries. On the contrary, it is a new approach for many countries and some of the common law tradition. Those two states usually tend to apply the personal law of each future spouse to determine the substantive requirements of the marriage.

The Hague Marriage Convention mentions that a marriage shall be celebrated where the future spouses meet the substantive requirements of the internal law of the state of

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[1094] Art. 23 of the United Nations International Covenant on Civil and Political Tights of 16 December 1966 reads as follows: *"1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. 2. The right of men and women of marriageable age to marry and to found a family shall be recognized. 3. No marriage shall be entered into without the free and full consent of the intending spouses. 4. State parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution, in the case of dissolution, provision shall be made for the necessary protection of any children."*

[1095] The Hague Conference on Private International Law, *The Hague Marriage Convention,* September 2007, p. 1, available at https://assets.hcch.net/docs/4b59dd11-e4bd-4b96-9244-513645c7658b.pdf, *last accessed on June 22, 2017.*

[1096] Art. 2 of Hague Marriage Convention. "2. The formal requirements for marriages shall be governed by the law of the State of celebration."

celebration and one of them has the nationality of that state or habitually resides there; or where each of the future spouses meets the substantive requirements of the internal law designated by the choice of law rules of the State of celebration.[1097] The first option has three advantages, namely that the local authorities can apply the requirements of their own law in respect of consent of the parties or age and degree of prohibited relationship, and not the requirements of the law of the domicile, nationality or community of foreign marriage candidates. This provision gives a chance to avoid characterization problems, for example, the problem of determining whether a parents' consent is a matter of form or substance because the applicable laws will coincide. It also allows unusual or oppressive requirements of a foreign law to be ignored.[1098]

Articles 3-6 of the Hague Marriage Convention apply a technique which the contracting states have a certain flexibility. They may reserve the right to maintain certain exceptions to the reference rule in Art. 3. For instance, the state of celebration may require the future spouses to furnish any necessary evidence as to the content of any foreign law which is applicable under the provision of Art. 3.[1099] However, the application of a foreign law previously declared applicable can be refused if it is manifestly incompatible with the public policy ("*ordre public*") of the State of celebration.[1100] Alternatively, a contracting state may reserve the right, by way of derogation from Art. 3 (1), not to apply its internal law to the substantive requirements for marriage in respect of a future spouse who neither a national of that State nor habitually resides there.[1101]

Public policy in the Hague Marriage Convention can have a negative effect on the proposed marriage by refusing to give effect to a foreign law perceived as too permissive. For instance, the foreign law allows a child marriage or polygamy without any restriction. On the other hand, it can positively favor the validity of marriage by

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[1097] Art. 3 of the Hague Marriage Convention. *"A marriage shall be celebrated:- (1) where the future souses meet the substantive requirements of the internal law of the State of celebration and one of them has the nationality of that State or habitually resides there; or (2) where each of the future spouses meets the substantive requirements of the internal law designated by the choice of law rules of the State of celebration."*

[1098] HCCH, *The Hague Marriage Convention,* the article available as "The outline of Convention" at its official website: https://www.hcch.net/en/instruments/conventions/full-text/?cid=88, last accessed on February 13, 2017.

[1099] Art. 4 of the Hague Marriage Convention. *"The State of celebration may require the future spouses to furnish any necessary evidence as to the content of any foreign law which is applicable under the preceding Articles."*

[1100] Art. 5 of the Hague Marriage Convention. *"The application of a foreign law declared applicable by this Chapter may be refused only if such application is manifestly incompatible with the public policy ("ordre public") of the State of celebration."*

[1101] Art. 6 of the Hague Marriage Convention. *"A Contracting State may reserve the right, by way of derogation from Article 3, sub-paragraph 1, not to apply its internal law to the substantive requirements for marriage in respect of a future spouse who neither a national of that State nor habitually resides there."*

disregarding obnoxious limitations imposed by foreign law such as prohibition of marriage between persons of different race.[1102]

The contracting states have also the option to extend the *lex loci celebrationis* to all marriage celebrations.[1103] Accordingly, a marriage must be celebrated in the respective state where the future spouses meet the substantive requirements of its internal law. This approach also works as a simplification of Art. 3-6 of the Hague Marriage Convention, as the only applicable law shall be the internal law, not any foreign law.

4.2.2.2 Recognition of Foreign Marriages

Part Two of the Hague Marriage Convention, about the recognition of the validity of marriage, is mandatory. The basic rule is: the state of celebration, either contracting states or any state, determines the validity of the marriage. The state of celebration that validates a marriage, may be any state and not just another contracting State. The recognition of foreign marriage can be excluded if the marriage is celebrated by military authorities or marriage celebrated aboard a ship or aircraft; proxy marriage, posthumous marriage, and informal marriage.[1104] The Contracting State is bound, subject to a limited number of exceptions and subject to any applicable public policy, to recognize the validity of the marriage if it is valid according to the law of the state of celebration.[1105]

Those provisions avoid the need to review the foreign law applicable according to the conflict of law rules of the recognizing state. Special provision is made for a marriage concluded by diplomats or consuls. When an authorized institution of the State where the marriage is celebrated has issued a marriage certificate, the marriage shall be presumed to be valid unless it is verified to the contrary.[1106]

The number of exceptions is allowed to be the valid grounds to refuse the recognition of marriage. A Contracting State may (not obligate) only refuse to recognize the validity

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[1102] Peter Nygh, *The Hague Marriage Convention – A Sleeping Beauty?,* A. Borras et al (eds.), at E Pluribus Unum, (The Netherlands: Kluwer Law International: 1996), pp. 253-267.

[1103] *Ibid.* Australia has done such extensions when it ratified the Convention. The Australian Marriage Act (1985) chose not to maintain the pre-existing rule requiring the application of the law of the domicile of the future spouses to questions of material validity, and streamlined the Australian choice of law rule entirely according to the *lex loci celebrationis.*

[1104] Art. 8 of the Hague Marriage Convention. *"This Chapter shall not apply to: (a) marriages celebrated by military authorities; (2) marriages celebrated aboard ships or aircraft; (3) proxy marriages; (4) posthumous marriages; (5) informal marriages."*

[1105] Art. 9 of the Hague Marriage Convention. *"A marriage validly entered into under the law of the state of celebration or which subsequently becomes valid under that law shall be considered as such in all Contracting states subject to the provisions of this Chapter. A marriage celebrated by a diplomatic agent or consular official in accordance with his law shall similarly be considered valid in all Contracting States, provided that the celebration is not prohibited by the State of celebration."*

[1106] Art. 10 of the Hague Marriage Convention. *"Where a marriage certificate has been issued by a competent authority, the marriage shall be presumed to be valid until the contrary is established."*

of marriage, if at the time of marriage, according to the law of the State - one of the spouses has legally married to another man/women; or the spouses were directly related to each other as brother and sister; one of the spouses is underage for marriage; if one of the spouses lacks the capacity to give consent to marry or does not freely consent to the marriage. The recognition may not be refused if the marriage has subsequently become valid by reason of the dissolution or annulment of the prior marriage.[1107]

In addition, public policy may be invoked by the requested State, for instance, when a marriage certificate is fake or the underlying marriage is fake or fraudulent.[1108] Therefore, the convention favors the recognition of marriage, yet at the same time, it avoids the possibility any forum shopping to marry.

The rule of recognition of the validity of marriage also applies if the question on recognition arises in the context of another question, for instance, in the context of a re-marriage: the validity of the previous marriage is then referred back to the law of the place of celebration.[1109]

The other chapter of this convention is general clauses and final clauses. The general clauses provide provisions where the state has two or more territorial units in which different systems of law apply in relation to marriage. Any reference to the law of that State in connection with the celebration and recognition shall be construed as referring to the law of the territorial unit in which the marriage is or was celebrated, or in which recognition is sought.[1110] In this situation, the convention needs not be applied to the recognition in one territorial unit of the validity of a marriage entered into in another

[1107] Art. 11 of the Hague Marriage Convention. *"A Contracting State may refuse the validity of a marriage only where, at the time of the marriage, under the law of that State – (1) one of the spouses was already married; or (2) the spouses were related to one another, by blood or by adoption, in the direct line or as brother and sister; or (3) one of the spouses had not attained the minimum age required for marriage, nor had obtained the necessary dispensation; or (4) one of the spouses did not have the mental capacity to consent; or (5) one of the spouses did not freely consent to the marriage. However, recognition may not be refused where, in the case mentioned in sub-paragraph 1 of the preceding paragraph, the marriage has subsequently become valid by reason of the dissolution or annulment of the prior marriage."*

[1108] Art. 14 of the Hague Marriage Convention. "A Contracting State may refuse to recognise the validity of a marriage where such recognition is manifestly incompatible with its public policy ("*ordre public*")."

[1109] Art. 12 of the Hague marriage Convention. *"The rules of this Chapter shall apply even where the recognition of the validity of a marriage is to be dealt with as an incidental question in the context of another question. However, these rules need not be applied where that other question, under the choice of law rules of the forum, is governed by the law of a non-Contracting State."*

[1110] Art. 17, 18 of the Hague Marriage Convention. *"17. Where a State has two or more territorial units in which different systems od lay apply in relation to marriage, any reference to the law of that State in connection with the recognition of the validity of a marriage shall be construed as referring to the law of the territorial unit is which recognition is sought. 18. Where a State has two or more territorial units in which different systems of law apply in relation to marriage, any reference to the law of that State in connection with recognition of the validity of a marriage shall be construed as referring to the law of the territorial unit in which recognition is sought."*

territorial unit.[1111] If the two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be the system of law designated by the rules in force in that State.[1112]

This convention was ratified by Australia, the Netherlands and Luxembourg, signed by Egypt, Finland and Portugal. It entered into force on April 1, 1991, years after it was concluded. The Netherlands reserves that it will recognize a marriage which is solemnized within the European territory. Australia reserves to maintain the pre-existing rule requiring the application of law of the domicile of the future spouses to questions of material validity.

4.2.3 Marriage according to the Hague Marriage Conventions

Some states withdrew from the Hague Marriage Convention of 1902. The reason was, among others, the rigid insistence on the nationality principle which became difficult to justify in an era of increased mobility.[1113] The disabilities imposed by German in the period before 1914 on men who had not fulfilled their national service obligations, or by German and Italy in 1930's on marriages between persons of Jewish descendant and so-called "Aryans" made the operations of the Convention at times unconscionable.[1114] The other reason is also that this convention did not bridge the gap between states of nationality and the Anglo-Commonwealth states.[1115]

The next Hague Convention makes the law of the place of celebration or *lex loci celebrationis,* as the primary reference. This application can be expanded to the material or substantive requirements of the marriage. It also applies a technique whereby the contracting states have a certain flexibility. However, the Contracting States of this convention are not too many.

Peter Nygh states that a marriage under most legal systems still provides greater protection, especially for women and children, so it is better to facilitate a marriage

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[1111] Art. 19 of the Hague Marriage Convention. *"Where a State has two or more territorial units in which different systems of law apply in relation to marriage, this Convention need not be applied to the recognition on in one territorial unit of the validity of a marriage entered into in another territorial unit."*

[1112] Art. 20 of the Hague Marriage Convention. "Where a State has, in relation to marriage, two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the system of law designated by the rules in force in that State."

[1113] Peter Nygh, *Loc. Cit.,* pp. 253.

[1114] Peter Nygh, p. 254. Peter Nygh mentions that this convention was designed to deal with the problem of fraudulence of law, rather than combating the limp marriage or establish a favor to marriage establishment.

[1115] *Ibid*. A convention which granted a right of veto over marriage to the State of nationality was unacceptable to the common law countries which fall within the ambit of the new Hague Conference after 1955. Not only did they apply the more flexible concept of domicile, but the Anglo-Commonwealth concept of "formality marriage" was broader that of the civil law, notably in relation to parental consent. In United States, reference is primarily to the law of the place of celebration, rather than any personal law of the parties, unless the marriage was evasive of a strong policy of the domiciliary state.

rather than to restrict it. Therefore, the Hague Conventions does not go far in this direction and remains in minimal standards of age, freedom of consent and incest.[1116] This convention must be seen as establishing *favour matrimonii.*

The author agrees with the opinion stated above, and agrees that it is better to facilitate a marriage as a state can. Knowing that most of ASEAN Member States still strongly adhere to religious marriages, ASEAN needs to find a system on how to harmonize and add the minimum standards on the religious norms. In addition, ASEAN needs to find its balance or bridge of the application of the Principle of Nationality and Principle of Domicile. It is advisable that the application of the primary principle of the ASEAN Member States, either the nationality of domicile principle, is added with the "Habitual Residence" in order to find the applicable law in PIL cases provided that it is acceptable to the ASEAN Member States. This initial idea shall be more elaborated in the next chapter in respect to the proposed choice of law in ASEAN One Community.

5 Notes and Conclusions

1. The ASEAN Member States follow the customary PIL with regards to marriage regulations. The states divide the regulation into two parts, namely the capacity to marry of a prospective couple and marriage solemnization.
2. In relation to the capacity to marry, the ASEAN Member States apply the Principle of Nationality and Principle of Domicile. The Principle of Domicile applied by the ASEAN Member States is attached to their citizens almost the same as nationality. A stateless person, person with multiple nationalities and refugee are regulated differently. They can be treated the same as foreigners or nationals. A refugee shall be treated differently, as his/her previous civil rights existing according to his/her national law remain valid.
3. The application of both principles, the Principle of Nationality and Principle of Domicile, widens the gap between member states. *Renvoi* and or the application of habitual residence can play a role in bridging the gap by determining the capability to marry of the couple.
4. In relation to solemnization, the ASEAN Member States apply the local law of country where the marriage takes place, known as the principle of *Lex loci celebrationis*, save for Myanmar (due to limited information).
5. In relation to recognition of marriage, the ASEAN Member States require their nationals to register their marriage in the representative office of state where the marriage takes place, or register it after they return to their home country. The ASEAN Member States regulate, save for Myanmar (due to limited information),

[1116] *Ibid.,* p. 266-267.

that registration shall be conducted if the marriage does not contradict the marriage regulation of the state.

6. The United Nations has, at least, nine conventions which mention the right to marry in the framework of human rights. There are Convention of Universal Declaration of Human Rights and CEDAW to which all ASEAN Member States are the Contracting Parties. Those conventions also serve as the background for ASEAN to establish ACWC.
7. Based on the nine UN conventions, it is understood that:
    a. a family is the natural and fundamental group unit of society. Therefore, it is entitled to protection by the society and state.
    b. Men and women of marriageable age have equal right to marry and to found a family.
    c. A marriage shall be entered into with free and full consent of the intending spouses.
8. All marriages must be registered in appropriate official registration held by the competent authorities. If it cannot be said as a must, it is strongly advised to be registered. The background is free and full consent. Consent must be expressed by each of the couples in person after due publicity and in the presence of the authority who is competent to solemnize a marriage and credible witnesses. A couple is allowed not to be present before the competent authority, provided that he or she fulfills two requirements. First, the competent authority is satisfied with the reason for such exceptional circumstance; and the second, the party has expressed and not withdrawn her/his consent to marry before the competent authority. It is to avoid an arranged marriage which usually happens without the consent of the couple, either from both of them or one of them.
9. The rights and responsibilities of spouses as to marriage, during a marriage and at its dissolution are the same.
10. Men and women have the same rights and responsibilities during a marriage and at its dissolution, equal rights as parents, the same personal rights as husband and wife.

Chapter 7:
Facing ASEAN One Community & Indonesia

1 Introduction

The previous chapters have thoroughly observed marriage establishment according to the marriage laws of each ASEAN Member State, both domestic marriage regulations (Chapter 5) and mixed marriage regulations (Chapter 6). Bearing these findings in mind, this chapter further discusses and outlines the thoughts and concept of cooperation of ASEAN One Community as well as Indonesian policies and possibilities.

This chapter is comprised of two parts. The first part having a particular focus on ASEAN includes the choice of unification or harmonisation of marriage laws amongst the ASEAN Member States, scope of application of the proposed choice of law rules and methodology. The second part consists of the preparation of Indonesian policies and possibilities for ASEAN One Community. Similar to the previous part, it consists of the choice of unification or harmonisation of international mixed marriage for the preparation of ASEAN One Community.

In relation to the above, Bill of Indonesian PIL of 1997 shall be one of the cores of discussion because it contains the general opinion of Indonesian PIL scholars. The discussion will cover the harmonisation and or unification of PIL rules in Indonesia. The main discussion of Bill of Indonesian PIL of 1997 shall cover the general provisions of PIL, family and marriage provisions.

2 Proposed ASEAN Choice of Law on Marriage Law

Each ASEAN Member State has its own marriage rules and regulations constituting its religion, unique culture and values. These regulations initially exist in order to regulate a marriage between its nationals and its solemnization taking place within its territory. Nevertheless, this situation may change in the future. The map to ASEAN One Community gives more possibility for a marriage between a couple who come from the ASEAN Member States. This marriage will cause more frequent contact between the legal systems of the ASEAN Member States. Therefore, instruments or provisions should be prepared and completed.

In this paragraph, the author would like to discuss the provisions on marriage and recognition of marriage amongst the ASEAN Member States.

2.1 Purposes and Objectives of the ASEAN International Family Law

When discussing the future of marriage laws within ASEAN in the framework of ASEAN One Community, one of the primary questions is concerned with what ASEAN wishes to attain in this field of law.

In relation to the objectives of the marriage law, the author would like to argue that, firstly, legal certainty shall be one of the objectives. Such goal includes more objectives, such as predictability, prevention of limp relationship and reduction of the risk of forum shopping. As legal certainty is fundamental, ASEAN must strive for it to serve the protection of stability interest, which is particularly important for the realisation of ASEAN One Community. Freedom-based fundamental union can be ensured if the exercise of freedom does not involve the loss of legal position that has already been acquired in other member states.

The objective of legal certainty involves the unification and or harmony of PIL rules. In this regard, it is advisable to correspondingly consider that the endeavor to achieve the aim of unification of PIL rules as such and at all cost, shall never be a goal in itself. The content of rules is more important, bearing in mind that for some member states, higher values than uniformity of rules and coherent approach prevail.[1117]

The second objective is mutual recognition amongst the ASEAN Member States. This objective has two characters which will influence the ASEAN international family law. The first character is that by virtue of this principle, legal traditions and system of the ASEAN Member States are respected. The second character is that on the basis of mutual recognition principle, equivalence of legal norms of the member states is recognised. This objective is in line with the main principle of PIL and ASEAN, namely equality of legal system of ASEAN Member States[1118].

Bearing in mind the goals of the ASEAN One Community, development of an ASEAN system of marriage law should lead to the establishment of ASEAN judicial area in which all citizens can assert their rights, irrespective of the Member State where they reside or have their nationality. This assertion of rights denotes the identification of competent jurisdiction, designation of the applicable law and effective enforcement of judgements.

In addition to the general aims, the protection of particular interest will come into play depending on the field of family law issues. For instance, in the choice of law on divorce,

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[1117] Boele-Woelki, "*To be or not to be: Enhanced Cooperation in International Divorce Law within the European Union*", Victoria University of Wellington Law Review, 2008, pp. 779-792.

[1118] The principle of ASEAN point (1) as stated in the Bangkok Declaration 1967, "*…in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of South-East Asian Nations; …*". See Sub-chapter 4.1.2.

the principle of gender equality plays an important part, while in the field of adoption, protection of the best interest of children is of substantial part. Those principles are adopted by the ASEAN Member States through international conventions to which they become state parties.

2.2 Methodology of ASEAN marriage law

This paragraph is dedicated to the quest for a specific methodology of the marriage law of ASEAN. Firstly, there is a need for a theoretical foundation of the ASEAN system of marriage law. Secondly, the ASEAN system of marriage law will constitute a full part of ASEAN law, which has repercussions on its content. Therefore, the unique character of ASEAN and its consequences for the development of a common ASEAN system of marriage law will be analysed. Finally, initial impetus will be given to the development of a proper method of ASEAN marriage law.

The need for a theoretical foundation of ASEAN marriage law is clear due to the establishment of ASEAN One Community. Consequently, as it is in progress, sooner or later the marriage law, or in general, the international family law, will be one of the agendas. The discussion of marriage, divorce and adoption shall be put on the table for discussion. Although several ASEAN Member States or their scholars might possibly state that there is no need to unify or harmonize the field of marriage law, one day ASEAN will undoubtedly challenge this area or other particular matters of the international family field.

2.2.1 Ideal Characteristics

It is advisable for the approach of ASEAN marriage law to have the ideal characteristics of material code: coherence, logical structure, absence of contradiction, conformity of codified and applied law, completeness, clarity, ease of use and publicity.[1119] In the short term, the approach may be: coherent. Therefore, a clear and reliable reasoning behind the thought is required. It is important to develop a clear, coherent and transparent choice of law rules in the international family law to ensure legal certainty and flexibility.

The approach can be initiated with an issue, for instance, the establishment of marriage and its recognition. The approach may be separated from other related issues, as the proceeding of a certain topic approach is possible and acceptable. This approach is important at least for two primary reasons: first, it will be easier to achieve consensus on the issues taken in isolation, and second, the unification or harmonisation of issues

[1119] Aude Fiorini, *The Codification of Private International Law in Europe: Could the Community Learn from Experience of Mixed Jurisdictions?, Electric Journal of Comparative Law Vol. 12.1, (May 2008),* p. 8. In another writing, it is stated as *"… that the law be clear and comprehensive, that it reveals the underlying principle, and that it presents the rules it enacts in a logical order. …"* See Hein Kötz, *The Value of Mixed Legal Systems, Tulane Law Review,* Vol. 78, 2003, p. 437.

related to marriage law remains very sensitive as proven from time to time. The separate legislative development of instruments will inevitably lead to fragmentation. This fragmented approach will be easier to achieve consensus on the issue taken in isolation compared to work undertaken in a wider area.[1120] However, a systematic approach is required to avoid any overlapping and contraction issues.

Due to the variation of legal instrument (Chapter 4.8), it is also important to start the work for consolidation of instruments adopted in the area of judicial cooperation in civil matters. Consistency of legislation should be enhanced by streamlining the existing instruments. The aim should be to ensure coherence and user-friendliness of the instruments, thus ensuring a more efficient and uniform application thereof.

Both initiatives above do alter the fact that a proper and sound methodology of ASEAN marriage law should be developed to overcome the risk mentioned above.

A comprehensive and consistent choice of law system requires a basic agreement on the determination of the applicable law. From this point of view, the development of ASEAN system of marriage law raises several questions related to the establishment of a new PIL instrument, for instance, how does a legislator determine that a policy-oriented rule is called for, or whether a neutral approach will do? When do they opt for the main rule rather than another one and why? What are the background and bases for views on the objectives of rules to be created? Is the final draft consistent with those views? To what extent does political compromise taint coherence between the purposes of rules as originally conceived and their expression conceived in subsequent amended versions?

The question of what is a "proper and sound methodology" of ASEAN marriage law should be enhanced. Considering the problems faced by ASEAN legislature surrounding the establishment of common marriage law rules, it is obviously not easy to answer this question. An important point of departure is the character of ASEAN that is clearly relevant to the development of a proper methodology on ASEAN marriage law. That character will be discussed in the following discussion.

The main difficulty of ASEAN in unification or harmonisation of its rules and regulations, in particular, the marriage law, shall be the consistency of political will of each ASEAN Member State. In addition, each ASEAN Member State has its own substantive law approaches and values.

[1120] Baarsma, *Loc. Cit.,* pp. 219.

2.2.2 Intra-ASEAN and or extra-ASEAN law approach

Another question in addition to those above is whether ASEAN needs an intra-ASEAN PIL rule system? Universally, the applicable choice of law rules are the norms aiming to regulate a cross-border family relation, regardless of the countries with which the persons involved are connected. It should disregard as to whether or not the states are the ASEAN Member States. The intra-ASEAN choice of law system seems to suggest that cross-border family relation is to be regulated only in the ASEAN context with little attention to the rest of the world.

The development of an intra-ASEAN system of international family law would offer the establishment of an ASEAN system of private interregional law. It might allow for closer cooperation between the members on the basis of mutual trust. One of the advantages of having the intra-ASEAN choice of law system is that the ASEAN judicial area can be ensured. Nevertheless, will these aims and objectives of ASEAN integration be better served with intra-ASEAN choice of law rules? No argument or answer on the view that different rules dealing with extra ASEAN cases may still have an indirect or undesirable effect distorting the other purposes and the ASEAN judicial area.

It thus seems that the specific ASEAN aims and objectives of PIL are not served better with the limitation of scope of application of the common choice of law to intra-ASEAN cases. Consequently, the establishment of an intra-ASEAN choice of law is not recommended, especially if one takes into account a universal scope of application. Indeed, the establishment of universal choice of law rules would certainly offer advantages.

Application of the same law to the same legal relationship by the courts of the ASEAN Member States is the ultimate goal of the ASEAN harmonisation of PIL. If this situation is about to happen, in return it will improve legal certainty. If the universal choice of law rules are established, it will not be necessary to make the intricate differentiation between intra and extra ASEAN relationship.

2.3 Need for a theoretical foundation of ASEAN international family law

At this moment, the ASEAN One Community is one of the objectives of ASEAN. In relation to it, ASEAN has the priority to focus on economic cooperation. It is easy to understand, as welfare and economic development are the main concerns. The other aspects, namely the international marriage law is not on the agenda of the ASEAN meeting yet. However, sooner or later, ASEAN will need to consider it and furthermore, will need to establish a theoretical foundation of the marriage law, or in general, the international family law. For those reasons, ASEAN needs to consider four conditions which can be part of the basic thoughts of ASEAN marriage law or in general, the international family law.

2.3.1 Unique character of ASEAN

ASEAN is inter-governmental cooperation whereby each of the ASEAN Member States holds its full authority and sovereignty. The ASEAN Member States do not transfer any part of their sovereignty to this cooperation. Therefore, ASEAN is strictly stated as an inter-governmental organisation. ASEAN has no supranational governmental body. In addition, all of the member states have the equal position.[1121] Those situations are contradictory to the European Union which has a unique supranational organisation that handles particular sovereignty. It has an incipient common foreign and security policy in its dealing with other nations, as well as has the flag, anthem, motto and founding dated, the so-called Europe Day.[1122] Nevertheless, similar to the EU, ASEAN has attributes that are associated with an independent country. ASEAN has the flag, anthem, emblem, motto and fundamental principles, ASEAN also celebrates its anniversary.[1123]

The situation of ASEAN shows that the ASEAN Member States hold the authority of law-making of ASEAN regulations. The ASEAN law is non-existent, as regulations are actually the national laws. The same situation applies to the field of marriage law, either domestic marriage or marriage containing foreign elements. Thus, what is the influence of the situation above to ASEAN in preparing its arrangement of the marriage law within ASEAN as the matters questioned?

In the subsequent discussion, two specific issues related to this question will be dealt with. First, respect for the national laws of the ASEAN Member States as the existing legal diversity and to what extend ASEAN should respect the existing legal diversity. Second, what can be united and or mixed within the ASEAN while maintaining the existing diversity.

[1121] This is quite different compared to the EU. The sovereign member states of EU have voluntarily transferred a part of their sovereignty. As a result, the transfer of sovereignty to the European Union is now for a large part a supranational organization. It makes the EU has many traits of federation, yet the EU is not a federation, in addition to making the organization more than a mere free-trade association. The EU is often characterised as a new and separate entity that strongly differs from all other existing regional and international organization. See N.A. Baarsma, *Loc. Cit.*, pp. 224-225. See also the comparison between ASEAN and EU in particular the Economic Community in Dwi Tjahja Kusumo Wardhono, *Establishing and Integrated Payment System (Real-Time Gross Settlement) in ASEAN, A Proposal for a Cross-Border Payment Mechanism to Support the AEC 2015,* Dissertation, (Groningen: Ulrik Huber Instituut, 2015), pp. 137-140.

[1122] For instance, the treaty of Lisbon introduced in the EU-Treaty, a High representative of the Union for Foreign Affairs and Security Policy to coordinate the Union's foreign policy with greater consistency and to present a united position on EU policies (Art. 18 of EU-Treaty), see N.A Baarsma, *Ibid.* See also the official website of the EU available at https://europa.eu/european-union/about-eu_en last access on November 30, 2017.

[1123] See the official ASEAN motto, flag, emblem, day, anthem, name as an intergovernmental organization available at http://asean.org/asean/about-asean/asean-flag/ last access on November 30, 2017.

2.3.2 Respect for the existing legal diversity

Respecting the diversity of the ASEAN Member States should be the cornerstone of the marriage law or in general the international family law within ASEAN. It is the long-standing attitude in ASEAN, also called as tolerance.

With this tolerance, ASEAN has adapted to diversity in its member state of affairs. Four phases of influences coming into the ASEAN, namely the phase of India, China, Muslim and Western, have left its sketches over the ASEAN region. The traces of influences from the main religions such as Buddha, Hindu, Islam and Christian can be found in the ASEAN Member States.[1124] In term of linguistic, ASEAN has its diversity by having the language of Austronesia with its sub-group Polynesian language, Austroasiatic language, Thai language, as well as Tibet-Burmese language. Those languages become the root of the ethnic group which extremely shows a discrepancy.[1125]

ASEAN does not react only as a passive receiver to those coming waves. Its indigenous peoples accept the values according to its cultures. Such acceptance diverges from one to another state resulting in further diversity.[1126] The culture that has been forged for ages in ASEAN makes ASEAN has something in common, tolerance to diversity, that makes ASEAN barely has any fight or war with each other.[1127]

This diversity is also shown in the legal system. The international family law rules of the ASEAN Member States are, in particular, predominantly influenced by the main legal systems, namely civil law and common law legal systems (see Chapter 6). The diversity found in the legal systems in the ASEAN Member States is positive to enrich the thought in understanding PIL itself. The tolerance to diversity has its own questions, namely how far it should be respected and which part can be discussed for unification.

Respect for legal diversity of ASEAN Member States is evident in two distinct ways. The first way is about to left untouched the national peculiarities of substantive family laws of the member states. Apart from the lack of competence to unify issues of substantive law, it is questionable whether ASEAN unification of substantive family

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[1124] Kishmore Mahbubani, Jeffery Sng, *Keajaiban ASEAN Penggerak Perdamaian,* (ASEAN Miracle A Catalyst for Peace) (Jakarta: PT Gramedia Pustaka Utama, 2017), pp. 21-46.

[1125] *Ibid.*, pp. 23-25.

[1126] *Ibid.* The influence of Buddhism is shown by the scattered Buddha statutes in almost all countries which can also be found in Candi Borobudur in Central Java, Indonesia. The dogma or the delivered teaching may be differ although it still has the same name. The influence of Hinduism can be found in Ceylon/Sri Lanka, Java, Bali and Kalimantan in Indonesia. Yet, Hinduism in Bali is different from Hinduism in Kalimantan although it still in the same country, and different from Hinduism in India. Islam in Aceh Darussalam, Indonesia is different from Islam in Java and the Philippines. Out of all ASEAN Member States, Indonesia is the most diverse country. It is not only related to variance in ethnic languages, but most of the ethnic groups have their own legal system, the so-called *Adat* law. The *Adat* law is officially recognized by the government.

[1127] *Ibid*. pp. 17-18. Minor hostilities or encounters occurred in ASEAN, for instance the disagreement between Cambodia and Thailand. However, it is different from wars in the Middle East or the Balkans.

law would be feasible. The field of family law is quite often described as being too deeply rooted in the national legal cultures, thus it can prevent the attempt of unification. Pursuing the unification of international family law, ASEAN should coordinate the diversity of national laws.

The second way is to respect the diversity by allowing the application of foreign law. The reference to a foreign law should be respected because it also reflects respect to the national law. Willingness to apply the law of other ASEAN Member States is one of the key features of integration because it ensures mutual recognition and expresses fundamental equivalence of the legal systems. Considering the importance of application of the foreign law from the perspective of respect for legal diversity, ASEAN leaders need to make great efforts to ensure that this feature occupies an important place in the choice of law.[1128]

Pertaining to legal diversity, it is no surprise if one or many member states will look for the protection of fundamental characteristic of their legal system, which is part of their national identity. Therefore, it is advisable for ASEAN leaders to take note the extent of such protection. [1129]

2.3.3 United in diversity

From the previous paragraph, it is clear that respect for the existing legal diversity is required. Therefore, it is advisable to balance such principle with the motto "united in diversity".

This motto is, basically, not a new invention in ASEAN. At least, such principle can be found in the official national emblem of the Republic of Indonesia, the so-called "*Garuda Pancasila*". The giant bird Garuda grips a white ribbon scroll inscribed with the national motto from ancient Sanskrit language, *Bhinneka Tunggal Ika,* which can casually be translated into "united in diversity". It is reasonable since Indonesia is the most diverse state in ASEAN. The ethnic groups, cultures and languages are exceptionally diverse, yet it is united as a state.[1130]

Adopting this principle is advisable for ASEAN. It can maintain diversity in its region yet such diversity shall not become the basis for separation, instead serving as a source

[1128] Kohler has observed it within the EU region, whereby a refusal of some Member States of the EU to apply foreign law, thus automatically excluding the application of the laws of other states. It shows that, each member state does not express much willingness to cooperate, which is the key features of European integration. The European choice of law rules on issues of family law do not exclude the application of foreign law. Therefore, this characteristic of the European choice of law expresses that the diversity of the Member States' legal system is respected. See N.A. Baarsma, *Loc. Cit.*, pp. 230-231.

[1129] *Ibid.* The same also happens in the process within the EU as observed and mentioned by N.A. Baarsma, *Loc. Cit.,* p. 231.

[1130] Kishmore Mahbubani, Jeffery Sng, *Loc Cit.,* p. 205-210.

of enrichment of its cultural values. At the same time, the ASEAN Member States maintain and keep cooperation amongst them for the sake of unity within the region of ASEAN.

Diversity in the substantive rules in marriage law in ASEAN cannot be denied. However, with respect to the international family rules in ASEAN, the ASEAN Member States has shown strong influence of both common legal system and civil legal system. To choose only one system to the choice of law in ASEAN obviously shall not be the case, as the best solution is about to balance those rules, the *mixedness*.

2.3.4 *Mixedness*

Bearing in mind that the ASEAN Member States inherit both of the main traditional legal systems in its PIL rules, the mixtures of both systems can be a good pattern for ASEAN. The common ASEAN choice of law should show a *mixedness* of these two legal traditions by adopting both common and civil law tradition and display characteristic and coordinate both into *mixedness,* to reflect the aims of the legal certainty balance by the flexibility (see sub-chapter 7.2.1). The *mixedness* can also resettle the unique situation of ASEAN by respecting the diversity of legal systems yet remaining bound as one community.

Establishment of a successful mixedness of both legal systems can be found in several places and methods with, of course, cost to be paid.[1131] One of the examples of *mixedness* is the Louisiana PIL code, in addition to Code 10 in Quebec.[1132] This code has mixed both legal systems indicating that it is possible to establish a PIL system. The Louisiana PIL has managed to find an independent third path between the common law and the civil law path.[1133] This path is the best picture of the balance between the principles of legal certainty and flexibility. Symeonides states that this code does not aspire to resolve the eternal tension between common and civil traditions, but it can reconcile the two traditions and provide a framework for them for an interactive

[1131] For instance, the mixed legal system mentioned by Hein Kötz in the process of achieving European Civil Code whereby he offers the mixed legal system. The mixed system can take the uniformity of English style with its strive for precision, great detail, even on trivial points and often adopt a form of expression so complex, convoluted, and even pedantic. On the other hand, it can adopt the rational style of legislative drafting such as Israeli mode of legal reasoning and general approach to the law. The other possibility of uniformity is the form of a restatement with broad and generalized statements of principles. The cost of sacrifices will have to be made by all parties, some lawyers have to get rid from their thought of language that *"… language of some of the exuberant technicalities that have been flourishing all to rampantly in the walled enclosures of their national legal systems. …"* See Hein Kötz, *Loc. Cit.,* p. 435-439.

[1132] Aude Fiorini, *Loc Cit.*, p. 13.

[1133] S.C. Symeonides, *Private International Law Codification in a mixed jurisdiction: the Louisiana experience, RablesZ* 1993, pp. 460-516; S.C. Symeonides, *The Conflict Book of the Louisiana Civil Code: Civilian, American or Original?, Tulane Law Review, 2009,* pp. 1042-1081.

coexistence.[1134] The common law system lays the notion of a strong emphasis on flexibility, while the civil law system lays the notion of certainty.

The Louisiana PIL provides for three distinct techniques to strike a balance between these notions: at the first level, the use of alternative connecting factors, for instance, in the marriage regulation, it states that a marriage is valid if the state where the solemnization takes place or the state where the parties have their first domicile as husband and wife, is treated as valid; at the second level, the use of "soft" connecting factors, for instance, the application of the most closely connected law; at the third level, the use of escape clauses, for instance, the exception to the designated law if it is manifestly clear that the circumstances of the case are more closely connected to another law.[1135]

ASEAN can learn and adopt the technique of PIL above. ASEAN can learn that three specific techniques can be used to strike a balance between the common and civil law traditions: the use of alternative connecting factors, use of soft connecting factors and use of escape clause. The balance of certainty and flexibility in this regard is crucial.

The ultimate goal of a unified choice of law system is that in all Member States, the same national law is applied to an international family law in ASEAN irrespective of the states in which marriage solemnization takes place.[1136] Using a combination of strict rules and possibility for flexibility displacing the presumptively applicable law in favour of the principle of closest connection, ASEAN choice of law and family issues should attempt to attain an appropriate balance between certainty and flexibility and accordingly, between the common and civil law traditions.

2.4 ASEAN International Family Law *de lege feranda*

2.4.1 ASEAN International Family Law *de lege lata*

At this moment, the ASEAN international family law does not exist. The international family law in ASEAN is the family law with a foreign element which is the national law of the ASEAN Member States. Discussion about the same (see Chapter 6) shows that all ASEAN Member States has this kind of rules. The marriage regulations cover (a) capacity to marry between a national and a foreigner in its territory; (b) marriage between a couple who have the same nationality outside their territory; (c) marriage between foreigners within their territory; and (d) marriage in their embassy or representative office in a foreign country.

[1134] Aude Fiorini, *Loc. Cit.*, pp. 3-4. See also the *mixedness* in context of the EU at N.A. Baarsma, *Loc. Cit.*, pp. 232-234.

[1135] *Ibid.*

[1136] See Sub-Chapter 6.5. *Lex loci celebrationis is* applied in the ASEAN Member States, save Myanmar.

From the regulations above, ASEAN legislators can identify the common things that can serve as starting points to discuss about the ASEAN marriage law.

2.4.1.1 Adherence to the Savigny choice of law methodology

In relation to the application of substantive law of personal status, the ASEAN Member States apply the Principle of Nationality and Principle of Domicile. Brunei, Malaysia, Myanmar and Singapore apply the Principle of Domicile (place of birth) but the provisions are attached to their nationals likewise attachment of the Principle of Nationality. However, Singapura states slightly different that the applicable law can involve the intention of the couple, namely the law of the intended domicile in the future. After its main regulation, the ASEAN Member States stipulate the particular situations of a person, for instance, stateless person, person with dual or multi-nationalities, etc.[1137]

It is common to apply the national law to its own citizens. In general, the national law is the closest law to its nationals.[1138] On the other hand, domicile tends to be the factual relation or circumstance of the person to his/her surroundings where he/she has a living residence.[1139] The territoriality determines the connection to the law. Both of those principles actually looking for the closest connection to the person. Although the application is different, the main principle of those regulations is similar.

Reference to the applicable law, the first option and the second option adhere to the Savigny choice of law: the choice of law rules designate the law of country with which the case is most closely connected, the classical choice of law approach.[1140]

2.4.1.2 "Lex loci celebration" for marriage solemnization

The ASEAN Member States apply the same principle, namely *lex loci celebrationis* to the marriage validity. An exception is made for Cambodia, as the first state which requires a marriage to be solemnised within its territory or in its representative office or embassy (see Sub-chapter 6.2.2 and 6.2.5). It shows that the state only recognizes the

[1137] There is also a person with permanent residence or temporary residence (in case of Vietnam), even refugee (in case of the Philippines).

[1138] Heinz-Peter Mansel, *Nationality* in *Encyclopedia of Private International Law*, (ed.) Jürgen Basedow, Giesel Rühl, Franco Ferrari, Pedro De Miguel Asensio, (Cheltenham: Edward Elgar Publishing Limited, 2017), pp. 1289-1301. See also the famous case of Nottebohm, the International Court of Justice mentions nationality as a *"legal bond having at its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence juridical expression of the fact that the individual upon whom it is conferred either directly by the law or as a result of an act of the authorities, is in fact more closely connected with the population of the state conferring nationality than with that of any other state."* See International Court of Justice, Nottebohm Case (Second Phase) Judgement of 6th April 1955: ICJ Report, p. 4, pp. 23-24.

[1139] Anatol Dutta, *Domicile, Habitual Residence and Establishment, Loc. Cit.*, pp. 555-561.

[1140] This approach, of course, with adjustment to the current situations developed in contemporary situation. See M. H. ten Wolde, K.C. Henckel, *European Private International Law, A Comparative Perspective in Contracts, Torts and Corporations* (Hephaestus Publishers: Groningen, 2012), 9-12.

local form of marriage. Myanmar is different as it is silent for marriage with foreign nationals.

Those countries also have similar regulations that the marriage registration is obligatory, and a couple shall make marriage registration within the respective embassy or representative office or after the return of the couple to the motherland.

2.4.1.3 Public Policy limits the marriage recognition

All of the ASEAN Member States regulate that a marriage which is solemnized abroad shall be registered (and recognized) provided that the marriage does not contradict public order or the marriage law of the respective state. In other words, public policy plays a role in this area whereby registration shall be only possible if it is in line with the national values.

2.4.1.4 No "party autonomy" in the field of marriage

Marriage law in the ASEAN Member States applies directly to a person and gives no room to the person concerned to choose any other law to be the law applicable to him/her. In other words, there is no party autonomy in the field of marriage law. A couple do not have any right or authority to choose a certain law applied to regulate the substantive requirements nor the applicable law to solemnise the marriage.

The party's autonomy can only apply to marital agreement, especially assets. The option is also limited or has a connection with the couple concerned or assets itself. In relation to this freedom, the Singapore law reflects slightly different. Its regulations state that the applicable law can be the law of the intended domicile of the couple. In this regard, the applicable law can be chosen by the couple with, of course, certain requirements. In addition to those regulations, the party's autonomy in the marriage law shall not be the case in ASEAN or at least at this moment.[1141]

[1141] See the comparison of this particular matter in the context of the EU, N.A. Baarsma, *Loc. Cit.,* p. 237. In Europe, the party's autonomy is the cornerstone in the determination of the applicable law. Leaving the parties to choose the applicable themselves is part of a general trend towards the liberalisation in the PIL; it becomes more frequent. The thought that an individual, instead of the state, can best weigh the relevant choice of law interest is the primary thought. The author is of the opinion that "party autonomy" is in the field of the family law, yet it is limited. For instance, in the party's autonomy of husband and wife in choosing the applicable law to the marital assets. They can choose though the applicable law which is limited to the laws connected to them. In Singapore, the party's autonomy of the couple is slightly different. The applicable law can be the law of the designated state of the couple. Although a couple must fulfill some requirements to have the law of the designated state be applied, the applicable law is chosen by the couple based on their freewill.

2.4.2 Basic Premise of the International Family Law *de lege feranda*

The previous paragraph 7.2.3.1 shows that the characters of ASEAN respect the existing legal systems (diversity) and are united in the diversity by prioritizing the attitude of tolerance, significant behaviour of the ASEAN society that appears to date.

Having those principles and behaviour of ASEAN in mind, the international family law in ASEAN will be built. Uniformity in all situations shall not be the case due to diversity in ASEAN. Therefore, the main question that ASEAN should answer is what methodology of the ASEAN choice of law can be, which can accommodate diversity in ASEAN but at the same time securing the balance of legal certainty and flexibility.

From the above, it is obvious that diversity shall be the first. As a result of diversity of objectives of ASEAN One Community, underlying choice of law methodology is marked by pluralism. Therefore, adherence to the Savigny choice of law methodology is argued to be positive; the methodology whereby the closest connection shall be the starting point. With this methodology, the choice of law shall be the neutral and multilateral choice of law rules propagated. There is also a place for a balanced policy of PIL, which interest such as the protection of the best interests of children, protection of incompetent persons, principle of gender equality and respect for the rights of defence.

Principle of the closest connection ensure that the legal systems involved are equally and evenly eligible to apply. This aspect is important because mutual recognition presumes an equivalence of legal norms of the ASEAN Member States.

2.4.3 Unification or harmonization of marriage law?

In aiming the objectives, ASEAN can make several efforts like what other regional cooperation or international organisations do. There are possible attempts that ASEAN can assess, unification in substantive rules and terms of the harmony of conflict of law rules, collaboration in two-level cooperation, namely the legislation and enforcement of law.

2.4.3.1 Unification

ASEAN can consider collaboration, like counter to the regulatory competition. The aim of collaboration is not trying to apply a national law as much as it can. On the contrary, unification is about to establish the common rules in order that the ASEAN Member States have the same legislation. This unification can be in the uniformity of the substantive rules, or uniformity of the common rules on PIL. These approaches are

common and can be seen in the cooperation between states or international organisations.[1142]

There are some organisations using those techniques, such as the UNIDROIT Institute in Rome[1143] and the United Nations Commission on International Trade Law (UNICTRAL).[1144] Those institutions endeavour the unification of substantive rules corresponding to the title of the respective convention. For instance, the Convention on the International Sale of Goods 1980 of the UNCITRAL whereby it has substantive provisions on the international sales of goods.[1145]

There are also specific institutions which focus on very particular matters, for instance, the World Intellectual Property Organization (WIPO)[1146] or the International Civil

[1142] For comparison and further detail, see Franco Ferrari, *Factoring (Uniform Law),* in *Encyclopedia of Private International Law*, (ed.) Jürgen Basedow, Giesel Rühl, Franco Ferrari, Pedro De Miguel Asensio, (Cheltenham: Edward Elgar Publishing Limited, 2017), pp. 731-738.

[1143] UNIDROIT is the International Institute for the Unification of Private Law. It is an intergovernmental organization on harmonization of PIL. Its purpose is to study the needs and methods for modernising, harmonising and coordinating the private and commercial laws in particular matters between the states and to formulate uniform law instruments, principles and rules to achieve those objectives. Its project includes drafting of international conventions and production of model laws. Indonesia is a member to this international organization. To date, UNDROIT produces 10 international conventions. It is interesting to note that its ongoing study is about civil procedure. See the official website of UNIDROIT available at http://www.unidroit.org/about-unidroit/overview last accessed on November 28, 2017.

[1144] UNCITRAL is recognized as the legal body of the United Nations system in the field of international trade law. Its business is the modernization and harmonization of rules on international business, whereby it is formulating modern, fair and harmonized rules in commercial transactions. These include the conventions, model laws and rules which are acceptable worldwide, legal and legislative guides and recommendations of great practical value, updated information on case law and enactments of uniform commercial law, technical assistance in law reform projects, as well as regional and national seminars on uniform commercial law. See the official website of UNCITRAL available at http://www.uncitral.org/uncitral/en/about_us.html last accessed on November 28, 2017.

[1145] The CISG 1980 is one of the conventions of UNICTRAL. The purposes of CISG is to provide a contemporary, uniform and fair regime for contract for the international sales of goods. It is about to contributes certainty in commercial exchange and decreasing transaction cost. CISG applies to international transactions and avoid the recourse to rules of PIL for those contracts falling under its scope of application. International contracts falling outside the scope of application of the CISG, as well as contracts subject to a valid choice of law, will not be affected by the CISG. Domestic contracts are still regulated by the domestic laws. UNCITRAL is the core legal body of the United Nation system in the field of international trade law. A legal body with universal membership specializing in commercial law reform worldwide. UNCITRAL carries out the modernization and harmonization of rules on international business by formulating modern, fair and harmonized rules on commercial transaction. These include the conventions, model laws and rules which are acceptable worldwide, legal and legislative guides and recommendation of principles value, updated information on case law and enactment of uniform commercial law, technical assistance in law reform projects, regional and national seminars on uniform commercial law. See the official website of UNCITRAL available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html last accessed on November 22, 2017.

[1146] World Intellectual Property Organization is the global forum of Intellectual property services, policy, information and cooperation, a self –funding agency of the United States. It has 1991 member states, including all ASEAN Member States. The mandate of WIPO, governing bodies and procedures are set out in the WIPO convention, which established WIPO in 1967. Its mission is about to promote innovation and creativity for the economic, social and cultural development of all countries, through a balanced effective international intellectual

Aviation Organization.[1147] Their main topic of unification corresponds with their title of organisations. On the other side, there are regional organisations, namely the European Union,[1148] in a lesser degree, the MERCOSUR in Latin America[1149] and the *Organisation pour l'harmonisation du Droit des affaires en Afrique* (OHADA).[1150] Those regional and or international organisations on a certain stage undertake the unification of their rules.

property system that enables innovation and creativity for the benefit of all. See the official website of World Intellectual Property Organization available at http://www.wipo.int/about-wipo/en/ last accessed on November 22, 2017.

[1147] ICAO is a United States specialized agency established in 1944 to manage the administration and governance of the Convention on International Civil Aviation, or known as the Chicago Convention. Its vision is to achieve sustainable growth of the global civil aviation system. Therefore, it is to serve the global forum of states for international civil aviation. ICAO works with 192 member states, including all ASEAN Member States and industry groups to reach consensus in international civil aviation Standards and Recommendation Practices (SARPs) and policies to support a safe, efficient, secure, economically sustainable and environmentally responsible civil aviation sector. These SARPs and policies are used by ICAO Member States to ensure that their local civil aviation operations and regulations conform to the global norms. ICAO also resolves consensus-driven international SARPs and policies among its Member States and industry. ICAO also coordinates assistance and capacity building for States in support of numerous aviation development objectives, produces global plans to coordinate multilateral strategic progress for safety and air navigation, monitors and reports numerous air transport sector performance metrics, and audits state's civil aviation oversight capabilities in the area of safety and security. See the official website of International Civil Aviation Organization available at https://www.icao.int/about-icao/Pages/default.aspx last accessed on November 22, 2017.

[1148] European Union is the economic and political union of 28 Member States in the European region. On March 29, 2017 the United Kingdom notified the European Council of its intention to leave the EU. The process is ongoing, for the time being the United Kingdom remains a full member of the EU and rights and obligations continue to fully apply in and to the UK. EU has goals, among others, to promote peace, its values and well-being of its citizens, offer freedom, security and justice without internal borders and respect its cultural and linguistic diversity. The EU is based on the rule of law. Everything EU does is founded on treaties, voluntary and democratically agreed by its member countries. Law and justice are upheld by and independent judiciary. The member countries gave final jurisdiction to the European Court of Justice which judgements have to be respected by all. EU began as a purely economic union and developed into an organization spanning policy areas, from climate change, environment and health to external relations and security, justice and migration. See the official website of European Union available at https://europa.eu/european-union/about-eu/eu-in-brief_en last accessed on November 22, 2017.

[1149] MERCOSUR or the Mercado Comun del Sur also known as the Common Market of the South. It is established under the Asunción Treaty in 1991 and now has Argentina, Brazil, Paraguay, Uruguay, Venezuela and Bolivia. It has a goal to create a common market: trade liberalization, creation of common external tariffs, coordination of macroeconomic policy and commitment to the harmonization of their legislation. See further the official website of MERCOSUR available at http://www.mercosur.int/ last accessed on November 22, 2017. See also ISEAS, *MERCOSUR Economic Integration: Lesson for ASEAN,* ASEAN Studies Centre-ISEAS, Report No. 5, 2009.

[1150] OHADA is the organization for the harmonization of the business law in Africa in order to guarantee legal and judicial security for inventors and companies in its member states. OHADA was established by the Treaty on the Harmonization of Business Law in Africa signed on October 17, 1993 in Port Louis (Mauritius Ireland) and revised in Quebec on October 17, 2008. To date, OHADA has 17 member states. Years after its establishment, OHADA undertook work for legal unification in its Member States for development of business law, creation of an integrated legal space conducive for a viable and lively economic space. See the official website of http://www.ohada.org/index.php/en/ohada-in-a-nutshell/general-overview last accessed on November 22, 2017.

The phenomenon above gives the evidence of need felt by the international community for uniform rules that provide a reliable legal framework of transactions in a globalisation economy. Those facts also show that law-making tends to redeploy from the national law-making level to the international law-making level, although the approach is different from one another. It does not mean that the national perspective becomes less interesting or important.

Diversity in ASEAN, which extremely vary, makes an effort for unification will be like a book without an end. The aim of unification between the ASEAN Member States can be, at least, the minimum standards of marriage.[1151] Fortunately, the regulations of minimal requirements of marriage are revealed in the regulations of the right to marry in respect of human rights. As all ASEAN Member States are the contracting parties to the Convention of Universal Declaration of Human Rights, they all have commitments to the protection of human rights (see Sub-chapter 6.2). Discussion about the substantive rules of the ASEAN Member States (see Sub-chapter 5.2.1.3.1) shows that one of the common requirements is the free and full consent of both parties to the marriage, no more forced-marriage.

In the perspective of human rights (see Sub-chapter 6.4.1.10), men and women of marriageable age have the equal right to marry and to found a family, which is entered into on free and full consent. The competent registration official should register the marriage; if it cannot be said as a must, it is strongly advisable to be registered. It prescribes the minimum age to marry and marriage registration.

In the perspective of protection for women and children (girls in particular) from child marriage, AICHR and ACWC have strongly suggested the minimum age for brides to the ASEAN Member States. In relation to the minimum age to marry, most of the ASEAN Member States regulate the minimum age to marry. Even though, there are some states which remain silent about the exact age of brides,[1152] but the other prevailing marriage law that applies to non-Muslim mentions the minimum age to marry.

A similar case also happens to marriage registration. Discussion about the solemnization and registration of marriage (see Sub-chapter 5.2.2.1.4.4), shows that marriage registration is a must. In several states, marriage registration does not require validity.[1153] It is mentioned that unregistered marriage does not automatically become

[1151] For instance, regulating the minimum labour conditions and the recognition of intellectual property rights. Jürgen Basedow, *The Law of Open Societies: Private Ordering and Public Regulation in the Conflict of Laws,* (BRILL, 2015), pp. 79-80.

[1152] The states are Brunei (see Sub-chapter 5.1.1.3.3) and Malaysia (see Sub-chapter 5.1.4.3.3).

[1153] For instance, Myanmar allows marriage by reputation without registration. Brunei, Indonesia, and Malaysia, acknowledge marriage according to the religious law which can only be attended by witnesses, while Singapore and (also) Indonesia acknowledge a marriage based on customary law.

null, void or invalid marriage. However, in other marriage laws that apply to non-Muslim or civil registration law, marriage registration is required. It can be understood and is acceptable due to cultural or religious requirements.

Regardless of the last results in the paragraph above, unification of the minimum requirements through hard law seems possible, yet the period consumed for the unification process can be seen as an evolution, instead of a revolution. Bearing in mind that the ASEAN One Community will be realised in 2025, unification equivalent to evolution is not a wise approach.

2.4.3.2 Coordination by common rules on PIL

At the end of the nineteenth century, States have aimed a better coordination of their laws, not by harmonisation in substance. States adopted uniform rules in a choice of law, jurisdiction and recognition of decisions.[1154] At those time, the codification of choice-of-law rules in international treaties appeared as an interesting idea. The Hague Conference on Private International Law was established for those purposes.[1155] UNCITRAL and UNIDROIT and later, international organisations also exercise this approach corresponding to their title.

Coordination of the common rules on PIL can result in a similar reference to the applicable law on a PIL case or authorised jurisdiction. Due to the same reference to the applicable law, court decisions will be more likely similar. Therefore, the forum shopping or limp relationship can be avoided.

This approach is suitable for ASEAN in relation to establishing the ASEAN One Community. On one side, each member state can maintain its cultural values in its national law. Therefore, their sensitive issues shall not be intruded. On the other hand, when a member state faces a marriage with an international element or PIL marriage, the ASEAN Member States will appoint to the same applicable law.

In relation with solemnization, the ASEAN Member States have the same principles, namely *lex loci celebrationis*. In this regard, all ASEAN Member States are in consensus to apply the local law of country in which the marriage takes place. There are some of PIL rules that can be carefully considered to ensure that goals can be accomplished even though in a long period.

[1154] Jürgen Basedow and J Basedow, *The Law of Open Societies: Private Ordering and Public Regulation in the Conflict of Laws,* BRILL, 2015, p. 81.

[1155] See sub-chapter 6.4.2 regarding the Hague Conference on Private International Law. The Hague Conference on PIL has resulted in around 40 conventions in relation to family and civil matters. The list is available at https://www.hcch.net/en/instruments/conventions last access on November 25, 2017.

2.4.3.2.1 Substantive law: tendency to the Habitual Residence

Diversity in determining the applicable law of personal status exists. The main principles of PIL, either Principle of National or Principle of Domicile, at least still apply. With respect to the Principle of Domicile in Brunei and Malaysia, the application of the principles to a person is similar to the nationality. Nonetheless, the basic notion of that application is the same; it looks for the closest connection of the person concerned to the applicable law.

In this context of freedom of movement, "the closest connection" can be interpreted differently. It is not the place of birth or nationality or domicile of the parents, but the factual connection in daily life. In this case, the option of applicable law as a result of habitual reference has an extensive option to be exercised. Determination of the applicable law between the involved legal systems, are equally and evenly eligible for application. It is a reasonable provision because the applicable law does not only regulate and protect the person concerned. It is also to protect the rights and obligations of the people surrounding the person in question who have contact or legal relation with him/her.

In the previous discussion (see Sub-chapter 6.3.2), after determining the applicable law to a person in general, the States regulates the applicable law in particular cases, for instance, stateless person and person with dual or multiple nationalities, and even refugee. With respect to those cases, the capacity to marry is regulated differently. The regulations state that the applicable law must be according to the active nationality or the domicile of the person. It is advisable if the ASEAN Member States can state that the applicable law shall be according to common nationality. Yet, if it is not the case, it is advisable to be according to the common habitual residence, due to the principles of closest connection. In addition, it is in favour of the freedom of movement in ASEAN One Community. Due to this consideration, it is advisable for ASEAN legislators to observe and or look up the establishment of habitual residence.[1156]

2.4.3.2.2 Renvoi

Renvoi appears when reference to a foreign law appoints to the substantive law and its PIL rules. The reference is not *sachnormverweisungen, i.e.* choice of law rules that solely refer to the substantive rules of the applicable law, but also including PIL rules. The PIL rules give possibility for referring back to the law of the forum (*Rückverweisung*) or another state (*Weiterverweisung*).

In the event that each ASEAN Member State applies their current primary principle, or maybe principle of habitual residence, *renvoi* shall have tiny or even no room to apply.

[1156] Anatol Dutta, *Domicile, Habitual Residence and establishment, Loc. Cit.*, pp. 555-561.

If *renvoi* is applied, in case of principle habitual residence applies, reference to another state (*Weiterverweisung*) shall not be in line with the main prime principle, the closest connection. From this perspective, *renvoi* shall be rejected. If ASEAN choice of law is based on the principle of closest connection, the ASEAN Member States must structure its rules in such a way that the ASEAN Member States shall commonly refer to the most closely connected law.[1157] In addition, in a community, one should strive for harmony (of decisions). Therefore, renvoi is not suitable to other ASEAN members.

As to whether or not the ASEAN Member States will still have *renvoi* in its national law, it is possible if a member state would like to do so. They can have it as their connection shall not only be with another ASEAN Member State, but also other states around the world. It is the authority of the respective state whereby ASEAN has no right to interfere.

2.4.3.2.3 Public exception

Public policy exception is meant to exclude the application of foreign law if this will result in a violation of fundamental values of the society involved. This public policy regulation exists in most regulations of the ASEAN Member States.

The common PIL rules on the issue of international family law can propose to refer to public policy notion of the forum. However, the application of public policy differs from one another due to the divergence of value and culture of the ASEAN Member States. This application can endanger the objective decisional harmony. Therefore, it is advisable that this devise is applied restrictively. It is advisable that public policy can be formulated by mentioning the example, for instance, child marriage or same-sex marriage, incest.[1158] This formulation of public policy should be in the spirit to facilitate marriage rather than to restrict the marriages, and it must be seen as establishing *favour matrimonii.*[1159]

2.4.3.2.4 Lex loci celebrationis

It is interesting that all ASEAN Member States, save for Cambodia, have this principle in its regulations. It means that the ASEAN Member States are in consensus to apply the local law of country in which the marriage takes place for solemnization. Therefore,

[1157] As comparison, *Renvoi* is advised to be excluded in the regulations of divorce and registered partners in the EU. The European choice of law rules are to be based on the principle of closest connection. From this perspective, accepting *renvoi* would be contrary to such principle. See N.A. Baarsma, *Loc Cit.,* pp. 243-244.

[1158] For example, the formulation of public policy in the Hague Conference 1978 on the Celebration and Recognition of the Validity of Marriages.

[1159] Peter Nygh, *Loc. Cit.,* p. 266-267.

this rule should be maintained and it is advisable that other ASEAN Member States endorse Cambodia to accept the same principle.

2.4.3.2.5 Recognition of marriage

A marriage that is valid according to a state where it is established should be recognised in another state. The form of recognition is usually civil registration held by the authorised state institution designated for such purposes. The recognition of marriage is part of the vested rights, continuance of the rights and obligations of marriage that should still exist in another country. This recognition reflects the principle of equal legal system and mutual recognition. Therefore, it must be upheld.

In consideration of the above, marriage registration in the home state after the return of a couple is a critical issue. The further question is whether an officer must re-evaluate as to whether or not the couple fulfill the requirements and legal solemnization of marriage, or the officer can register and accept the marriage certificate in question as it is? It is advisable to apply the second thought with an exception in case of marriage contradicts public policy in *lex fori*. It is also advisable to attain the consent between the ASEAN Member States that recognition in one state member means recognition in other ASEAN Member States, yet again due to the public order in *lex fori.*

There are also some problems in this recognition, generally in the administrative procedures. Traditionally, there is legislation or apostille involved in the administration process, not to mention the requirement of the translation process from the original language into the acceptable language.

This situation takes time for the documents to be recognised and more costs for the authentication or translation. This situation should be overcome as cross-border recognition of civil documents is the first step to an effective freedom of movement rights. For this, the green paper of EU can be a lesson learned.[1160] This issue will be discussed below.

2.4.3.3 Marriage Certificate as Public Document and Civil Status Record

The mobility of society in ASEAN will increase once the ASEAN One Community is established. As persons have the freedom of movement, they can study, find a job in a member state in which they are not nationals. The exercise of freedom of movement is not free from the obstacles. One of the problems is to present or prove their civil status

[1160] European Commission, *Green Paper, Less bureaucracy for citizens: Promoting free movement of public documents and recognition of the effects of civil status records,* available at http://ec.europa.eu/justice/newsroom/civil/opinion/110510_en.htm last accessed on November 25, 2017.

to the authorities of another member state to benefit from a right or to comply with an obligation.

The documents may vary. It may be in the form of administrative documents, notarial acts such as property deeds, civil status records, miscellaneous contracts or court rulings. In relation to this writing, it is a marriage certificate. In general, those documents are not accepted by the authorities of a member state without bureaucratic formalities, while for most of the citizens, such bureaucratic formalities are cumbersome.

The person has to face the questions, for instance, which authorities are competent to comply with the formality above? How much will it cost? Must they appear in person? How long the process for completion? Will documents need to be translated into the local language or one of the international languages? That formality becomes important as the civil documents raise a question of a different magnitude concerning not the actual documents themselves, but their effects.[1161]

Civil status records used by a member state's authorities record the main events governing people's status (birth, marriage, death). It usually affects another member state. Each member state applies its own rules in this respect, and they vary from one to another. The same situation applies to marriage certificate. A marriage certificate in Indonesia shall not be directly recognised in Vietnam or the Philippines or another member state because of the difference in national rules applicable to the matter.

Therefore, in response to these concerns, it is advisable if the ASEAN member States also have a discussion related to the freedom of movement of public documents and recognition of the effect of civil status records. It is important so that the civil status granted or recorded in one member state shall have the same legal consequences in another. This document is the evidence to obtain access to a right, to receive a social service or to comply with a tax obligation.

Administrative formalities are necessary to authenticate public documents due to effective application outside the member state where they have been issued. This formality is a means to prevent any fraud. They concern the authenticity of signature and the capacity in which the person signing the document has acted.

[1161] *Ibid.* The same problem also appears in succession or inheritance. Discussion in overcoming the problem becomes the idea of this paragraph. See the discussion of this matters in Mathijs ten Wolde, *"Professionals in other countries be able to rely on a European Certificate of Inhertance for all purpose?"* in *Les Successions Internationales dans lÚE. Perspectives pour une Harmonization,* (Würzburg: Deutschen Notarinstitut (DNotl), 2004), pp. 503-514.

2.4.3.3.1 Legislation and apostille

The traditional way of authenticating public documents designed for use abroad is *legislation.*[1162] Legislation consists of a chain of individual authentication procedures for documents. In ordinary *legislation* procedure, the competent authorities of Member State must legalise the document by the embassy or consulate of the Member State in which it will be used. The *legalisation* process is often slow and costly because of the number of authorities involved.

A simpler legislation is *apostille*.[1163] It consists of provisions of the State issuing the documents of an authentication certificate. It has the same objectives as legislation but involves a simplified procedure. An apostille is provided by the competent authorities only of the State which issues the document. Intervention by the authorities of the member state in which the document is presented is no longer necessary.

2.4.3.3.2 Possible solutions to facilitate the freedom of movement

2.4.3.3.2.1 Cooperation between the competent national authorities

In the more recent development of international civil litigation, an emerging trend suggests that the courts and other bodies from different countries which are involved in a case are prompted to directly communicate with each other to solve the issues. The Hague Conventions related to children are one of the examples of this tendency.[1164] The Hague Conference on PIL has initiated a programme to convene judges and other competent persons for issues of child law to a meeting and to foster direct communication between them. PIL of children appears to be particularly well suited for developing such judicial cooperation. This direct communication of enforcement agents is particularly helpful.[1165] In international insolvencies, the need for coordination of actions of several liquidators and courts is also found.[1166] Learning from that situation, ASEAN can, for instance, adopt non-binding guidelines applicable to court-to-court

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[1162] *Ibid*.

[1163] HCCH, *The ABCs of Apostilles How to ensures that your public documents will be recognized abroad,* available at https://www.hcch.net/en/instruments/conventions/specialised-sections/apostille last accessed on December 1, 2017.

[1164] The 1980 Child Abduction Convention, the 1993 Adoption Convention and the 1996 Parental Responsibility Convention all command contracting States to designate a central authority. This central authority has a general obligation which is specified for certain activities and with regard to certain measures. Besides the central authorities, they permit some of their functions to be delegated to accredited bodies, i.e. private organizations. See Hans van Loon, *News from The Hague – The Hague Conference on Private International Law: Work in Progress (2008-2010)*, YBPIL 12 (2010), 419-433 at p. 422.

[1165] Jürgen Basedow, *Loc. Cit.,* p. 86.

[1166] America Law Institute has adopted non-binding guidelines applicable to court-to-court communications in transnational insolvency proceedings. The ILA also recommends that judges from different countries cooperate with one another to best manage transnational group action. See Jürgen Basedow, *Loc. Cit.,* p. 87.

communications in this context the civil registrar officers. This recommendation is further specified and elaborated and subject to certain limitations.

The road map of ASEAN has mentioned that the cooperation and communication of the legal officers and judges is one of the agendas. It is advisable to have also on agenda this matters as a point of discussion: the abolition of administrative formalities that could be accompanied by cooperation between competent authorities. In addition, it is also advisable to mention the Civil Registrar Officer of ASEAN Member States to engage administrative cooperation, either on a formal or informal basis. In the event of serious doubt about the authenticity of a document or if a document does not exist in a member state, the competent national authorities can exchange the necessary information and find an appropriate solution.[1167]

Exchange of information allows civil registrar of the member state of origin of a person to be informed of the fact that a record concerning a person has been made in another member state. This will also be useful regarding update of civil status records. A central registration can could also be envisaged to record civil status events occurring in member states other than the citizen's member state of origin. This grouping data will facilitate the issue and update of certificates. This application can be implemented in a suitable electronic means. Regarding this, it is advisable if ASEAN could put this on the road map to ASEAN Connectivity in 2025.

2.4.3.3.2.2 Simplifying legalisation or apostille.

Compared to legalisation, the apostille process gives more favour to the freedom of movement compared to the legislation procedure, although it also requires administrative steps and involves a period of time and expenses. Therefore, apostille can be considered as the way to provide a friendly procedure. Legalization is simplified by apostille as described in the Hague Convention of 1961 issued a convention in relation to public documents, namely Convention of 5 October 1961 Abolishing the Requirement of Legislation.

[1167] As a comparison, ASEAN can look to the cooperation of the International Commission on Civil Status (ICCS), an intergovernmental organization of sovereign states established based on the Bern Protocol on the International Commission on Civil Status concerning its documentary function and finances, see the official website at www.ciec1.org, last accessed on December 20, 2017. Its aims are to facilitate international cooperation in civil-status matters and to further the exchange of information between civil status registrars. Furthermore, it performs any studies and work, in particular by giving recommendations or draft conventions, aimed at harmonizing the provisions in force in the member states on matters to the status and capacity of person, to the family and to nationality and at importing the operation of civil-status departments in those states. See also Walter Pintens, *CIEC/ICCS (International Commission on Civil Status)*, in Jürgen Basedow, Giesela Rühl, Franco Ferrari, Pedro de Miguel Asensio (Ed.), *Encyclopedia of Private International Law*, (Cheltenham, UK; Northampton, MA, USA: Edwar Edgar Publishing, 2017), pp. 330-337.

2.4.3.3.2.3 Multilingual forms

Parallel with administrative formalities such as legalisation and apostille, the translation of a public document issued by another member state is another procedure with which citizens may have to deal. Therefore, it is advisable if the documents can be based on multilingual forms, at least the national language of both parties to the marriage and language of the state of destination.

2.4.3.3.2.4 *Standardizing Minimal Information*

The information is given in the civil status certificate and the content differs from one member state to another. The varying information and forms may cause a problem in understanding and identifying documents, both for the authorities and couple concerned. Therefore, it is advisable if the form and information given can also be standardised by imposing minimal requirements. It will facilitate the understanding of civil status data given in the certificate and prevent unnecessary questions in the member state where the certificate is presented.

2.4.3.4 Soft Law or Hard Law?

The results of unification can be found in various forms, soft law and hard law. The soft law can be defined as the rules of conduct which in principle have no legally binding force, nevertheless, may have a practical effect.[1168] The form of soft law can be model laws and legislative guides. These instruments do not establish any obligation for the states to adjust their law accordingly. Nevertheless, many countries accepted guidance from those texts when revising or adopting their national legislation on the respective matters.[1169]

ASEAN is inclined to apply this approach. ASEAN tend to use the soft approach. For instance, ASEAN has prepared a road map to One ASEAN Community. The "road map" is a guide on what kind of society ASEAN would like to have. There are other instruments. Although it is not the same as legal binding obligation as hard as a convention or treaty, all ASEAN Member States have the same understanding that it has a practical effect.

In relation to marriage, however, it is advisable that ASEAN can employ the hard law approach due its purposes and enforcement. As marriage is related to a person's status, legal certainty is compulsory. To that end, ASEAN should have a hard law approach. It

[1168] David M. Trubek, Parrick Cottrell and Mark, Nance, *"Soft Law", "Hard Law" and European Integration: Toward a theory of Hybridity*, Research Paper No. 1002, University of Wisconsin Legal Studies, 2004), p. 2-3. See also the description of Soft Law and Hard Law in the context of ASEAN in order to establish the ASEAN Economic Community, see Dwi Tjahjo Kusumo Wardhono, *Loc. Cit.,* 165-170.

[1169] *Ibid.*

is for the acknowledgement or recognition of marriage which further determines and influences the rights, duties and obligations of a person or personal status.

Bearing those in mind, the author proposes that ASEAN can have the following text or formulation in its hard law devise: "The ASEAN Member States shall recognize a marriage solemnized within the territory of the ASEAN Member States, only if it is solemnized according the local prevailing rules and regulations, and it does not contradict public policy of the state."

2.4.4 Position of PIL Conventions

The previous discussions on unification and coordination by common rules show the shifting of PIL as: choice of law perspective has shifted from vindication of sovereign rights to the facilitation of international legal transaction between private parties, also in this case, the international legal relations.[1170] The rule-making process also involves international relations and no longer merely national interest. In facilitating this, some work or conventions have been successful. Therefore, it is advisable for ASEAN to look around and learn from other international organisations, in particular, their products which have the same aims and objectives.

As mentioned in the previous sub-chapter, ASEAN can learn the unification and or harmonisation of PIL rules in several regional cooperation and international organisations or institutions. For instance, the Hague Conference and OHADA for the unification of PIL rules, or other international organisations which unified the substantive rules. Cooperation, discussion with those organisations and taking the good application in the context of ASEAN shall bring positive results.

[1170] Jurgen Basedow, *Loc Cit.,* p. 81.

3 Indonesian PIL towards globalisation and regionalisation

This paragraph is dedicated to discussion about Indonesian PIL. Objective and method shall be the foreword for consideration of the Bill of Indonesian PIL. This Bill is indispensable as not only it can be a tool of Indonesian policy to face the future ASEAN One Community, but it also becomes the common opinion of PIL scholars (*communis opinio doctorum)* on Indonesian PIL. Those points are essential to understand the situation of Indonesian PIL and further, what can Indonesia do and prepare for the future to play a role in the future ASEAN, particularly in harmonisation and or unification of marriage law in this particular region.

3.1 Objectives of Indonesian PIL

The objective of PIL was already in discussion when Indonesia was still referred to as the Netherlands Indië. It remained one of the discussions when BPHN prepared the Bill of Indonesian PIL. Discussing this particular topic is challenging, as Indonesian literatures are limited and classic. Yet, to obtain precise answers, observation of the Indonesian PIL history and basic thought is necessary.

3.1.1 PIL in the Netherlands-Indië regulations

Indonesia inherits the PIL rules stated in Art. 16, 17, and 18 of AB. These articles show the influences of classical Italian Statuta from Bartolo Saxoverato with regard to *statuta persona*, *statuta realia* and *statuta mixta* or *locus rigit actum*.[1171] Those articles are developed in the Netherlands-Indië, now Indonesia, with influence from several Indonesian scholars and experts of PIL. One of them was Kollewijn, expert on the Conflict of Laws in the Netherlands-Indië. At that time, PIL rules were developed concurrently with the Conflict of Laws.

Kollewijn was of the opinion that in determining the applicable law in a case of Conflict of Laws, consideration should not be according to what the better substantive rules are between the involved legal systems. Choice of the applicable law must be according to the closest connection between the respective case and the "chosen" law, because the involved legal systems are in the equal position one to another. Kollewijn stated that the legal system which has the closest connection to the respective case should be the properly applicable law in order to result in the best settlement for the involved parties. His statement encountered the thought of Conflict of Law developed in France which tended to be applied in the France legal system in any case.[1172]

[1171] In addition to those articles, there were Art. 3 of AB in relation to foreigners within the territory of the Republic of Indonesia and Art. 100 of RV and Art. 436 of RV regarding the foreign court awards.

[1172] *"Hukum yang paling erat hubungannya dengan hubungan hukum bersangkutan adalah hukum yang paling tepat sebagai hukum yang berlaku, karena dari hukum demikian dapatlah diharapkan penyelesaian yang*

He stated that the consideration of "better substantive rules" shall have no place in the Conflict of Laws. Such consideration is irrelevant, and it can turn down the Conflict of Laws. Therefore, the Conflict of Laws must be according to the basic notion, the equality of every legal system.[1173]

In the development of the Conflict of Laws in the Netherlands-Indië, there were some cases and exceptions whereby the Netherlands law was applied. For instance, the voluntary submission (*penundukkan sukarela*) of the local people to the Netherlands law, which then developed and could be divided into the partly voluntary submission (*penundukkan sukarela terhadap perbuatan hukum tertentu*) and the comprehensive voluntary submission (*penundukkan sukarela terhadap seluruh hukum*).[1174] Application of the Netherlands law based on those submissions was acceptable due to the easiness or simplicity of daily activities in trading and business at that time. Such cases did not override or set aside the main approach in determining the applicable law in the Conflict of Laws cases. Kollewijn remained devoted to the main principle in the cases of Conflict of Laws, as stated before, the closest connection which then gave an influence towards the thought of Sudargo Gautama in Indonesian PIL, as will be further described below.

3.1.2 Post-Indonesian Independence

3.1.2.1 Wirjono Prodjodikoro: Justice

Wirjojo Prodjodikoro[1175] stated that the Conflict of Laws, as well as the PIL, must put forward justice as its objective. He mentioned that the rules of the Conflict of Laws and PIL must be invented in such manner to fulfill the sense of justice of the involved parties of the cases or even in the broader scope, the society. The judges are entitled to found substantive rules according to its discretion or prudence (*rechtsvinding*) for the sake of justice. He mentioned that the ultimate framework and main objective of the PIL rules

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baik kiranya." This statement was the encounter of the thought of H. Solus of France who preferred to provide priority to the France law as the applicable law in the conflict of law cases whenever it is involved. It seems there was an assumption that the France Law was on top of or better than the others. Yet, H. Solus denied this. He said that the local law was vacant or gave no solution, therefore the France law must interfere to be applied for the sake of legal certainty and simple solution. See Wirjono Projodikoro, *Hukum Antar-Golongan di Indonesia,* (Bandung: Penerbitan Sumur Bandung, 1976), pp. 19-20. *Ibid.,* pp. 235-236.

[1173] *"Pertimbangan berdasarkan isi materiil dari sistem hukum yang tersangkut tidak dapat diberikan tempat dalam ilmu HAG, oleh karena pertimbangan yang demikian akan menghapuskan ilmu HAG. Dalam ilmu HAG, maka isi materiil dari sistem hukum adalah irelevan, atau dengan perkataan lain dapat dikatakan bahwa: HAG harus berpokok pangkal pada persamarataan semua hukum."* See *Ibid.*

[1174] Sudargo Gautama, *Pengantar hukum Antar Golongan*, (Jakarta: PT Ichtiar Baru-Van Hoeve, 1991).

[1175] Wirjono Prodjodikoro was the Chief Judge of the Indonesian Supreme Court in 1952-1966. His court decisions were appreciated by and became the models and illustrations in the lectures thought by Mr. B. Ter Haar. He was awarded *Doctoris Honoris Causa* from Faculty of Law University Airlangga on 1964, whereby before the inauguration he wrote, at least, fourteen books about Indonesian law, in addition to articles and annotations of court decisions which served as guidelines for other judges.

are to provide justice to the society. Justice must be placed at the centre of gravity and serves as the basis for the entire rules and system of PIL.[1176]

Wirjono Prodjodikoro mentioned that it was too rigid if the Conflict of Laws is only to determine the applicable law in a case. According to him, the Conflict of Law has a broader task namely finding another rule as another possibility in settling the case for the sake of justice. Another possibility can be, for instance, another rule beyond the legal systems of the defendant and the claimant, the international conventions.[1177] He mentioned that the application of the rules of the international convention should be according to *lex fori.*[1178] Wirjono Prodjodikoro mentioned that it is acceptable as long as the rules fulfill the sense of justice of the parties, or in other words, justice remains the main purpose.[1179]

In line with the consideration above, Wirjono Prodjodikoro stated similarly about PIL rules. He mentioned that the objective of PIL is to achieve justice for the society who are subject to the respective legal systems. For such purpose, he supported any effort of unification of substantive rules although, to some extent, he believed that such unification might not provide any guarantee that justice could, in the end, be found. Along with this purpose, the principle of equality of all legal systems must be respected.[1180]

In addition to the statement above, he mentioned that the provision described in Articles 16, 17 and 18 AB is decent, yet it is not perfect for the entire PIL cases in Indonesia. In particular cases, those skeleton keys might require a legal innovation or a legal reform or even an establishment of another rule for the sake of justice.[1181]

Wirjojo Prodjodikoro[1182] stated that the Conflict of Laws, as well as the PIL, must put forward justice as its objective. He mentioned that the rules of the Conflict of Laws and

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[1176] Wirjono Prodjodikoro, *Asas-asas Hukum Perdata Internasional,* 5th Ed., (Bandung: Sumur Bandung, 1979), pp. 49. *"… Pada permulaan buku ini saya sudah mengemukakan, bahwa tujuan dari hukum perdata internasional adalah untuk memenuhi rasa keadilan baik dari masyarakat nasional, maupun dari masyarakat negeri lain yang bersangkut paut dalam suatu peristiwa yang mengandung unsur-unsur asing. …"* The legal opinion of Wirjono Prodjodikoro is mentioned and quoted by Sudargo Gautama in Sudargo Gautama, *Hukum Perdata Internasional Indonesia Buku Ketiga Jilid Kedua (Bagian Kedua),* 3rd Ed., (Bandung: Eresco Bandung, 1988), pp. 156-157.

[1177] Yet, Wirjono mentioned that the application of rules shall be interpreted according to *the lex fori*. See Wirjono Projodikoro, *Hukum Antar-Golongan di Indonesia,* (Bandung: Penerbitan Sumur Bandung, 1976), pp. 30-36

[1178] Wirjono Projodikoro, *Asas-asas Hukum Perdata Internasional,* (Bandung: Penerbit Sumur Bandung, 1979), p. 13

[1179] Wirjono Projodikoro, *Hukum Antar-Golongan di Indonesia, Loc. Cit.,* pp. 11.

[1180] *Ibid.,* p. 19.

[1181] *Ibid.,* p. 25-26.

[1182] Wirjono Prodjodikoro was the Chief Judge of the Indonesian Supreme Court in 1952-1966. His court decisions were appreciated by and became the models and illustrations in the lectures thought by Mr. B. Ter Haar. He was awarded *Doctoris Honoris Causa* from Faculty of Law University Airlangga on 1964, whereby before

PIL must be invented in such a manner to fulfill the sense of justice of involved parties of the cases or even in the broader scope, the society. Judges are entitled to found substantive rules according to its own discretion or prudence (*rechtsvinding*) for the sake of justice. He mentioned that the ultimate framework and main objective of the PIL rules are to provide justice for the society. Justice must be placed at the centre of gravity and becomes the basis for the entire rules and system of PIL.[1183]

It can be imagined if Wirjono Prodjodikoro were still present, he will support the nowadays so-called "better law approach as a content-based method". With this approach, the courts consciously look to the content of the laws involved. This law selecting method is not blind to what the respective rules say. Before its application, the courts will first observe as to whether or not this law can provide the correct legal solution to the parties involved. The goal of this approach is the right outcome between the parties or the materially best solution, which he believes as "justice". Though in his writings he does not further explain the method he prefers to use or his tendency in finding "justice".[1184]

3.1.2.2 Sudargo Gautama: Green Paper of Indonesian PIL

Sudargo Gautama, the prominent Indonesian PIL scholars, consigned the Indonesian PIL in his eighth PIL book series and further added it with more than a hundred related books. His pivotal contribution is also the landmark decision book series about PIL cases awarded by Indonesian courts. It is not surprising if Sunaryati Hartono mentions him as the father of Indonesian PIL.[1185] Kollewijn in his letter to Sudargo Gautama appreciates his effort in collecting Indonesian landmark decisions as a dynamic legal source of the Conflict of Laws.[1186]

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the inauguration he wrote, at least, fourteen books about Indonesian law, in addition to articles and annotations of the court decisions which serve as guidelines for other judges.

[1183] Wirjono Prodjodikoro, *Asas-asas Hukum Perdata Internasional,* 5th Ed., (Bandung: Sumur Bandung, 1979), p. 49. *"… Pada permulaan buku ini saya sudah mengemukakan, bahwa tujuan dari hukum perdata internasional adalah untuk memenuhi rasa keadilan baik dari masyarakat nasional, maupun dari masyarakat negeri lain yang bersangkut paut dalam suatu peristiwa yang mengandung unsur-unsur asing. …"* The legal opinion of Wirjono Prodjodikoro is mentioned and quoted by Sudargo Gautama in Sudargo Gautama, *Hukum Perdata Internasional Indonesia Buku Ketiga Jilid Kedua (Bagian Kedua),* 3rd Ed., (Bandung: Eresco Bandung, 1988), pp. 156-157.

[1184] Mathias W. Reimann, *Better Law Approach,* in Jürgen Baseow, Giesela Rühl, Franco Ferrari, Pedro de Miguel Asensio (Ed.), *Encyclopedia of Private International Law*, (Cheltenham, UK; Northampton, MA, USA: Edwar Edgar Publishing, 2017), pp. 179-180. In the development of this "better approach", there are three methods, namely the judicial selectivism, legislative selectivism, and substantivism.

[1185] C.F.G. Sunaryati Hartono, *Pokok-Pokok Hukum Perdata Internasional* (translation: Principles of Private International Law), (Bandung: Binacipta, 1976), p. vii.

[1186] Sudargo Gautama, *Hukum Antar Tata Hukum (Kumpulan Karangan),* (translation: Interlegal Law (An Anthology)), (Bandung, Penerbit PT. Alumni, 2010), pp. 82-83. In his speech inaguration as a professor of Conflict of Law in FHUI, Sudargo Gautama mentioned a letter dated August 24, 1957 which Kollewijn wrote him, "*In de stroom van rechtspraak woordt de wijsheid van Jaren meegevoerd van mannen, die oog in oog met de praktijk*

Sudargo Gautama started his works when *Integentielrecht* was developed side by side with Indonesian PIL. Considering his systematic in the Indonesian PIL, he elaborated each of the PIL general theories and carried out the comparison to several states before transmitted those into Indonesian context at the end of each discussion. A similar approach was applied to the particular PIL theories, the personal status or family law and the civil procedural law (*hukum acara internasional*), respectively in his seventh and eight Indonesian PIL book series. In the discussion of the principles of personal status, he discussed among others, the relationship between parents and children, adoption, marriage, etc.[1187] Gautama developed the Indonesian PIL by elaborating the intellectual property rights and confiscation and nationalisation in Indonesia, among others, in Tobacco Bremen case.[1188]

The summary of the Indonesian PIL, the so-called Introduction of Indonesian Private International Law, published after his PIL book series was completed. In this book, he gives his suggestion that Indonesia can adopt the Principle of Domicile to foreigners who have their domicile in Indonesia after more than two years or other number of years designated by the immigration law.[1189] His suggestion is based on several reasons, among others, the most connecting factor between people with their surroundings, in addition to comparison with *intergentielrecht* mentioned by Kollewijn, whereby the applicable law shall be the most connected law. He is still attached to certain principles in specific cases, for instance, the best interest of the child for adoption.

He compiled his thoughts about Indonesian PIL in the academic bill of the Indonesian PIL.[1190] His immense influence is undeniable although the Bill was revised several times. He mentioned that justice is the objective of any legal systems, including Conflict of Laws and PIL. Yet, justice in these fields slightly differ, it is reflected in the principle of equality of any legal systems connected to a case of Conflict of Laws or PIL.

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van het leven stonden. In hun juridische fouten weerspiegeken zich niet zelden de eisen der gerechtigheid. Wie niet naar de rechtspraak wil omzien, omdaat daarin ook subjectieve dwaasheid en onverstand zich wertoont – zeker maar de stroom voert ze niet mee, ze verzinken – snijdt zich zeld af van de maatschappij, die hij moet dienen."

[1187] Soedargo Gautama, *Hukum Perdata Internasional Indonesia Jilid III Bagian I, Buku ke-7,* (Bandung: PT. Alumni, 2010).

[1188] Sudargo Gautama, *Segi-segi Hukum Internasional pada Nasionalisasi di Indonesia,* (Bandung: Alumni, 1975).

[1189] This advice was re-submitted by his apprentice, Zulfa Djoko Basuki, namely five years after the person concerned has his domicile in Indonesia. See the Proposal of the Bill of Indonesian PIL of 2015.

[1190] The Bill of Indonesian was first drafted in 1983. Such draft was revised several times and became the Bill of 1997, which serves as the starting point of discussions for re-drafting a new Bill of Indonesian PIL in 2014. The new team was chaired by I.B.R. Suprancana and introduced the new bill on PIL in 2015. This Bill was issued by the National Law Development Agency (*Badan Pembinaan Hukum Nasional*) under the Department of Law and Human Rights of RI, and should be evaluated by a public hearing. After the process of public hearing, the Bill of 2014 will be sent to the Government of RI and to the House of Representatives for approval. This will be further discussed in the next sub-Chapter.

He supported Indonesian PIL to pursue the decisional harmony or the so-called *Entscheidungsharmonie*, whereby differences between legal systems shall not handicap any relationships even if such relationships are established across national boundaries. In this case, Sudargo Gautama adopted the idea from Von Savigny stating that the Conflict of Law should create legal certainty in the international legal intercourse by creating decisional harmony, "*Entscheidungsharmonie*".[1191] This objective was discussed by Sudargo Gautama to encourage Indonesia to participate in the international conventions and to support *renvoi.* He also mentioned the necessity of flexibility in PIL in order to absorb the development of PIL, the so-called *pelembutan hukum* by Sudargo Gautama,[1192] or *rechtsverfijning* or *diperhalus* by Lemaire and Wertheim.[1193]

Based on the above, he supported the application of foreign law because reflecting that the judge also respects the foreign law. He also agreed with Wirjono Prodjodikoro that the application of foreign law and or international convention rule must be according to *lex fori.* In this sense, he addressed that the foreign law could be set aside by public

[1191] Th. M. de Boer as quoted in Mathijs H. Ten Wolde and K.C. Henckel, *European Private International Law, A Comparative Perspective in Contracts, Torts and Corporations,* (Groningen: Ulrik Huber Institute for Private International Law, 2012), pp. 10. See also the Symeon C. Symeonides, *Private International Law: Idealism, Pragmatism, Eclecticism, General Course on Private International Law,* (The Hague Academy of International Law, 2017), pp. 48-50.

[1192] Sudargo Gautama, *Hukum Perdata Internasional Indonesia Jilid III Bagian 2 Buku ke-8,* (Bandung: Penerbit Alumni, 1998), pp. 145-146, 184-186. Sudargo Gautama mentioned one example in tort case which absorb the *pelembutan hukum*. The classic principle in tort cases mentions that the applicable law shall be the local law where the tort is happened (*lex loci delicti*). Yet, the classic principle is softened by considering the relevant or surrounding factors of the respective case. The same approach is applied in the principles of "the proper law of the contracts" by Morris, or "Zociale Umwelt" by Binder, "milieu social" by Bourel and Stromholm." Sudargo Gautama mentioned that such tendency was happened in Indonesia in the intern Conflict of Laws. In tort cases, the classic principle was shifted to consider the law of the victim. Sudargo mentioned *" …. Sudah berulang-ulang harus diperhatikan "social surroundings" dari peristiwa hukum yang dihadapi. Misalnya saja pada saat menelaah persoalan: "percampuran dengan suku bangsa asli (vermenging met de autochtone bevolking), persekutuan dengan masyarakat hukum setempat (deelgenootschap van locale rechtsgemeenschap), peralihan agama, atau penyelundupan hukum (wetsontduiking) yang selalu menekankan pada segi-segi sosial ini, peralihan sosial (maatschappelijke overgang), dan sebagainya. …"* In other example, Sudargo Gautama mentioned that the Principle of Nationality should be soften whereby the Indonesian law should be applicable to the foreigners who is having his domicile in Indonesia for more than 2 years. In this case, Zulfa Djoko Basuki offers after 5 years.

[1193] Sudargo Gautama, *Hukum Perdata Internasional Indonesia Buku Ketiga Jilid Kedua (Bagian Kedua),* 3rd Ed., (Bandung: Eresco Bandung, 1988), pp. 156-157. *"… Rechtsverfijning terjadi bilamana suatu kejadian pada umumnya terang termasuk karena disebut dalam suatu peraturan hukum, tetapi karena beberapa hal dianggap bahwa kejadian itu dikecualikan saja dari berlakunya itu. Jadi lembaga ini mengakibatkan bahwa luas berlakunya kaidah hukum tertentu dipersempit. Pasal 16 AB menentukan bawa peraturan hukum nasional mengenai status personal mengikuti kaula negara Belanda (kini Warga Negara Indonesia) di mana pun mereka berada di luar negeri . Secara analogi dianggap pula bahwa orang-orang asing yang berdiam di Indonesia tetap takluk kepada hukum nasional mereka di bidang status personal ini. Setelah Pasal 16 AB ini secara analogis dilebarkan lingkungan berlakunya, maka pasal itu harus diperhalus (verfijnd) lagi sehingga perluasan secara analogis tidak dilakukan lagi, apabila peristiwanya berasal berkenaan dengan orang-orang asing di Indonesia yang berasal dari suatu negara dengan prinsip domisili. …"*

policy if the application is manifestly incompatible with the values of the judge. In the Indonesian context, it is the Indonesian 1945 Constitution and *Pancasila*.

The thought above is comparable to the thought of Mohammad Koesnoe, who also contributed valuable thought to the development of PIL.[1194] He mentioned in his dissertation that the development of Indonesian legal system, and PIL in particular, shall be based or must be in line with the Indonesian 1945 Constitution and *Pancasila*. On the other hand, Indonesia must also be ready to adjust and adapt to international regulations and international cooperation.[1195] In addition, he mentioned that *rechtsidee* or basic Indonesian values that must serve as the basis for Indonesian legal system are contained in the Indonesian 1945 Constitution.[1196]

3.1.2.3 Sunaryati Hartono, development of Economic Law

CFG Sunaryati Hartono in one of the influential scholars of the Conflict of Laws in Indonesia. Together with Mochtar Kusuma Atmadja, she mentioned that Indonesian legal system should be developed according to the functionalist approach. The other scholar mentioned that both scholars offered the pragmatic legal realism. By adopting the thought of Roscoe Pound from the United States, she mentioned that a legal system is a tool of social engineer that must be developed according to its function to acquire social welfare in the future. Through regulations and legislation, the creation of conducive atmosphere to support trade and business activities can be made. Therefore, this field can be developed pragmatically. This idea is to support Indonesian development which begins to grow.[1197]

According to her, the development of PIL, particularly PIL with economic aspects such as investment and international trade, was no longer sufficient merely with the approach of PIL. Such cases and relations transformed into transnational aspects, therefore, they needed another field of law, for instance, the administrative law, international public, to

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[1194] Mohammad Koesnoe, *Perkembangan dari Pemikiran Cara-Cara Penyelesaian Masalah Hukum AntarGolongan di Indonesia (translation from the author: The Development of the Thought of Problem Solving of the Interlegal Law Cases in Indonesia)*, Dissertation, (Surabaya: FH Universitas Airlangga, 1965).

[1195] This idea is also supported by Sunaryati Hartono as one of the bedrocks of Indonesian development. See C.F.G. Sunaryati Hartono, *Pokok-pokok Hukum Perdata Internasional,* (Bandung: Binacipta, 1976), pp. 67-68.

[1196] "*Nilai-nilai dasar tata hukum Indonesia menurut UUD 1945 antara lain: hukum harus berwatak melindungi daripada memerintah, mewujudkan keadilan sosial bagi seluruh rakyat, hukum itu dari rakyat dan mengandung sifat kerakyatan, hukum adalah pernyataan kesusilaan dan moralitas yang tinggi, baik dalam peraturan maupun dalam pelaksanaannya sebagaimana diajarkan dalam agama dan adat rakyat Indonesia.*" See Khudzaifah Dimyati, *Teorisasi Hukum, Studi Tentang Perkembangan Pemikiran Hukum di Indonesia 1945-1990*, (Surakarta: Penerbit Muhammadiyah University Press, 2004).

[1197] She reinforced that a legal system must be developed and oriented to the future. It has human invention in its formation. See C.F.G. Sunaryati Hartono, *Pokok-pokok Hukum Perdata Internasional*, (Bandung: Binacipta, 1976), pp. 58-68. See also her ideas about the "Transnational approach" in her dissertation C.G.F. Sunaryati Hartono, *Beberapa Masalah Transnasional dalam Penanaman Modal Asing di Indonesia,* Dissertation, (Bandung, Binacipta, 1973).

which she referred as the "transnational aspects".[1198] In addition, she mentioned that PIL should be hand in hand with the other field of law, for instance, PIL should be hand in hand with the Comparative Law because the comparison will show the best settlement which is suitable, appropriate and convenience with the situation of Indonesian.[1199]

3.1.2.4 "Sporadic" development of Indonesian PIL

In addition to the influenced main thoughts as described above, there are also some work on PIL which mentions and discusses the basic thoughts and theories of PIL. M. Soemampouw in her dissertation quoted Sudargo Gautama by mentioning that justice in PIL is different from justice in the substantive law in the civil law. The basic principle in achieving justice in PIL is equality of all legal systems.[1200] In determining the applicable law, the content or substance of law shall not be the consideration, instead it shall be which law has the closest connection with the case and or relation. Connection shall be evaluated objectively connected and not necessarily in territorial means.[1201] With respect to the applicable law of a contract, the applicable law shall be determined by the law which dominates the agreement. In looking for the most suitable applicable law, the choice of law between the parties is acceptable. Such freedom is limited by public policy if the contract must be connected to the interests of the state while the same must also consider legal certainty and justice.[1202]

In relation to public policy, particularly in the context of enforcement of foreign arbitral awards, it is found that Indonesia tends to prioritise internal public policy than external public policy, as public policy is interpreted closely to national interests and conditions, as commonly found in developing countries.[1203] Interpretation tension according to *lex fori* and national values are delicate. Researchers of the enforcement of foreign arbitral awards in Indonesia also produce analogous results in relation to the Convention on Recognition and Enforcement on Foreign Arbitral Awards of 1958 (New York Convention), the Convention on the International Center for Investment Settlement

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[1198] C.F.G. Sunaryati Hartono, *Pokok-pokok Hukum Perdata Internasional*, (Bandung: Binacipta, 1976), pp. 165-167

[1199] *Ibid.*, p. 47.

[1200] *"Keadilan dalam hubungan HPI adalah berlainan dengan keadilan yang dicapai oleh hukum materiil intern, pokok pangkal untuk mencapai keadilan HPI ialah persamarataan semua sistem hukum"*. See Gouw Giok Siong (Sudargo Gautama), *Hukum AntarGolongan,* cet.ke-2, 1960, p. 170-171.

[1201] Mathilde Sumampouw, *Pilihan Hukum Sebagai Pertalian Dalam Perjanjian Internasional,* Dissertation, defended at Faculty of Law of University of Indonesia, 1968, pp. 7-8.

[1202] "*Dalam hal ini pencarian hukum yang berlaku ini, pencarian bergerak dengan dua pola tujuan: kepastian hukum dan keadilan.*" See *Ibid.,* pp. 358-360.

[1203] Tineke Louise Tuegeh Longdong, *Asas Ketertiban Umum dan Konvensi New York 1958, Sebuah Tinjauan atas Pelaksanaan Konvensi New York 1958 pada Putusan-putusan Mahkamah Agung RI dan Pengadilan Asing,* Dissertation (Bandung: PT Citra Aditya Bakti, 1998), pp. 253-258.

Dispute (ICSID), and Indonesian Arbitration Law.[1204] Each revocation, refusal, annulment and or cancellation of foreign arbitral awards are interpreted according to *lex fori*. In other words, it is conducted according to the prevailing Indonesian rules and regulations.

The free-personal-value fields, for instance, the contract law or agreement about trade and international business as well as the international arbitration, are developing rapidly in Indonesia. The development of those rules is in accordance with the situation of and supports daily business activities in Indonesia, while at the same time is in line with the values of Indonesian 1945 Constitution and *Pancasila*. It shows that the suggestions of Sunaryati Hartono and Muhammad Koesnoe are delicate.

For the same field, Bayu Seto states that the development can be directed to the unification of substantive rules, instead of the choice of law rules, either through regional or international conventions or law restatements. The expected result at the end of the process is an independent and autonomous commercial law system as the objective.[1205] The author appreciates this thought, while enhancing that the implementation of those rules, as Wirjono Prodjodikoro and Sudargo Gautama state, must be interpreted according to *lex fori,* the Indonesian values. In addition, PIL is basically part of the national law.[1206]

With respect to the field of family law, the development also occurs although the number of researchers is not as many as in the free-personal-value field. [1207] Protection for

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[1204] See the thoughts as described and argued in writings, among others, in chronological events, Sudargo Gautama, *Perkembangan Arbitrase Dagang Internasional di Indonesia* (Bandung: PT Eresco, 1989), ---, *Hukum Dagang dan Arbitrase Internasional,* (Bandung: Citra Aditya Bakti, 1991), ---, *Aneka Hukum Arbitrase (Ke Arah Hukum Arbitrase Indonesia Yang Baru),* (Bandung: Citra Aditya Bakti, 1996); Huala Adolf, *Hukum Arbitrase Komersial Internasional,* (Jakarta: Radjagrafindo, 1994); Erman Radjagukguk, *Arbitrase Dalam Putusan Pengadilan* (Jakarta: Chandra Pratama, 2000); Yansen Dermanto Latip, *Pilihan Hukum dan Pilihan Forum Dalam Kontrak Internasional,* Dissertation (Jakarta, Fakultas Hukum Universitas Indonesia, 2002); Priyatna Abdurrasyid, *Arbitrase & Alternatif Penyelesaian Sengketa,* (Jakarta: PT Fikahati Aneska dan Badan Arbitrase Nasional Indonesia, 2002); Eman Suparman, *Pilihan Forum Arbitrase dalam Sengketa Komersial Untuk Penegakkan Keadilan,* Dissertation (Jakarta: Tatanusa, 2004); Basuki Rekso Wibowo, *Arbitrase Sebagai Alternatif Penyelesaian Sengketa Perdagangan di Indonesia,* Dissertation (Surabaya: FH Universitas Airlangga, 2007); Tin Zuraida, *Prinsip Eksekusi Putusan Arbitrase Internasional di Indonesia, Teori dan Praktek Yang Berkembang,* Dissertation (Surabaya: PT. Wastu Lanas Grafika, 2009).

[1205] Bayu Seto Hardjowahono, *Dasar-Dasar Hukum Perdata Internasional Buku Kesatu,* 4th Ed. (Bandung, PT Citra Aditya Bakti, 2006) p. 319. He also states that it is better to regulate personal status or field that is closely attached to personal values by the principles of PIL as part of the national law with harmonization or coordination of the common choice-of-law, either regionally or internationally through relevant and proper regional international conventions for the sake of legal certainty in international relations.

[1206] See further Mathijs H. Ten Wolde and K.C. Henckel, *European Private International Law, A Comparative Perspective in Contracts, Torts and Corporations,* (Groningen: Ulrik Huber Institute for Private International Law, 2012), pp. 11. See in Indonesian context, Sudargo Gautama.

[1207] Another recent research is about interfaith and or international mixed marriages which take place abroad. See Sri Wahyuni, *Nikah Beda Agama Kenapa ke Luar Negeri?,* Dissertation (Yogyakarta: Alfabet, 2016). One of the conclusions states that the registration of such marriage upon return of a couple constitutes silent

women and children is developed in the perspective of human rights and equality of gender, due to Indonesia's participation in the international conventions (see Sub-chapter 6.2).

The fundamental development of family law or personal status occurs in the protection for children from mixed marriages due to Indonesia's participation in CEDAW. Zulfa Djoko Basuki suggests in her writing that Indonesia can participate more in the international conventions of the Hague Conference, particularly conventions in relation to child protection. She argues that the law applicable to cases of child custody should be the local law of country where children have their habitual residence. In case of children with dual or multi nationalities, she adds reference to the active nationality of the children. In her other writings, she mentions that "habitual residence" and the principle of the best interest of children should be the main considerations.[1208] In addition to it, she also considers that the applicable law of foreigners who have their domicile in Indonesia should be the Indonesian law after five years, due to the period of immigration regulation. It is obvious that the principle of the closest connection plays a main role.

3.1.3 Idealism, Pragmatism, Eclecticism: Which way forward?

Those main thoughts from prominent Indonesian scholars provide the fundamental principle in the development of PIL in Indonesia. Some of the principles which remain relevant can be the basis for reference to go further. Equality of the legal systems and Indonesian values as described in the Indonesian Constitution and *Pancasila* is still necessary for the consideration of Indonesian PIL.

The author is of the opinion that equality of legal system remains the basis for Indonesian PIL because it reflects justice in PIL in achieving decisional harmony, notwithstanding Indonesian values. The other objective shall be legal certainty to ensure that the relationship shall not be handicapped by existing difference in legal systems in legal disputes across national borders. Nevertheless, it shall be side by side with flexibility. The author supports these thoughts because they are significant and the author has no other reason to opine otherwise. Therefore, the author encourages that those objectives can also be mentioned in the proposal of and in the Bill of Indonesian PIL, along with the necessity to face ASEAN One Community.

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recognition of the same. It confirms the principle of *lex loci celebrationis* in Indonesia. In addition, the research suggests that MA 1974 should facilitate interfaith marriages due to the pluralism of Indonesian society. This suggestion is analogous to the judge's consideration of Andy Vony Gany case.

[1208] Zulfa Djoko Basuki, *Dampak Perkawinan Campuran terhadap Pemeliharaan Anak (Child Custody), Tinjauan dari Segi Hukum Perdata Internasional*, Dissertation, (Jakarta: Yarsif Watampone, 2005). See also, Zulfa Djoko Basuki, *Bunga Rampai Kewarganegaraan Dalam Persoalan Perkawinan Campuran,* (Depok: Penerbit Fakultas Hukum Universitas Indonesia, 2007).

3.2 Method of Indonesian PIL

3.2.1 Continuance of Pluralism or Eclectic method

Wirjono Prodjodikoro mentions that the provisions described in Articles 16, 17 and 18 of AB are decent, yet they are no longer suitable for PIL cases in Indonesia. In particular, those skeleton keys require legal innovation or a legal reform or even an establishment of another rule for the sake of justice.[1209]

This calling was answered by Sudargo Gautama by handing his works, the Indonesian PIL book series. Observing those books systematically and his advices on the Bills of Indonesian PIL, he seemed to apply some types and structures of PIL. With respect to PIL rules, he compared the similar rules to another state. He added the analysis of recent cases and development, along with any particular aspects as well as typical legal relation, before interpreting it into the Indonesian context. It is clear that Sudargo Gautama performed the pluralism or eclectic method in his work. It is understandable as his book series were written when he was in the Netherlands.

Having considered the situation of Indonesian which continues its relationship with the international world and ASEAN, as well as harmonisation, it is necessary to have the objective and PIL rules. In addition, to achieve the objectives of PIL rules as stated above, the pluralism method or eclectic remains suitable for Indonesia.

3.2.2 Codification which remains necessary

The development of Articles 16, 17, and 18 of AB is scattered in several relevant laws. For instance, the rules of marriage can be found in the MA 1974,[1210] while the rules of adoption and its procedure can be found in Government Regulation No. 54 of 2007.[1211] A similar development occurs in the rules of goods and legal actions.[1212] The rules of foreign elements are usually found in technical regulations in the respective fields. Regulations on international intellectual property rights are stipulated in each law on trademark, law on copyright, law on patent, law on industrial design, law on

[1209] Wirjono Prodjodikoro, *Asas-asas Hukum Perdata Internasional, Op.Cit.,* p. 25-26.

[1210] Indonesia, *Undang-undang tentang Perkawinan (Law regarding Marriage),* Undang-undang No. 1 tahun 1974, LN No. 1 Tahun 1974 (Law No. 1 of 1974, SG No. 1 of 1974).

[1211] Government Regulation regarding the Procedure of Adoption, Government Regulation No. 54 of 2007, State Gazette No. 123 of 2007, Supplement No. 4768.

[1212] Tiurma M.P. Allagan, *Indonesian Private International Law: The development after more than a century, Indonesian Journal on International Law,* Vol. 14 No. 3, 2017, pp. 400-412.

geographical indication, law on trade secret,[1213] while land ownership by a foreigner having a domicile in Indonesia is stipulated in other government regulations.[1214]

Having considered those stipulations, it is advisable if Indonesia can have its PIL rules in one codified act. There are reasons to support this approach other than keeping or leaving the current situation, particularly the field of contract, international business and trade.

Problems or cases of PIL often encountered before the courts are not always small and simple. Such cases may appear in any district courts anywhere in Indonesia. Due to the imminent territory of Indonesia and the numbers of district courts all over Indonesia, it is advisable if Indonesia can have one codified regulation as a guideline for settling the cases. At least, the judges can hold the same laws and regulations and the information is easy to find.

In addition, the codification of PIL rules shall clarify the vague parts of PIL in Indonesia. For instance, what is the applicable law of a contract in Indonesia? In this case, it is believed that the Indonesian law recognises the choices of law by parties to the agreement. However, currently, several regulations negate the authority of the parties to choose the applicable law. In certain contracts, Indonesian regulations state clearly that the applicable law must be the Indonesian Law, or, in the event of any contradiction between the Indonesian law and the applicable law chosen by the parties, the Indonesian Law must be applied. Those contracts are, including but not limited to, employment agreements, franchise agreements, leasing agreements, an agreement to rent a house. According to the theory of PIL, this limitation may occur due to mandatory rules or due to the use of the *lex re sitae* principle mentioned in Art. 17 of AB. If those regulations can be codified, it will be easier for anyone to obtain information and clarification.

The codification is about to prevent chauvinist juridicism attitudes and allegations.[1215] A clear PIL regulation will prevent allegation that Indonesian court decisions have chauvinist juridicism. It is an attitude whereby judges tend to apply his own law (*lex fori*) regardless of any other (foreign) law that should be applied in solving a case. The application of this "less-wise" attitude shall cause court decisions become one-sided and

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[1213] Indonesia, *Undang-undang tentang Merek (Law regarding Trademark)*, Undang-undang No. 15 Tahun 2001, LN No. 110 Tahun 2001 (Law No. 15 of 2001, SG No. 110 of 2001).

[1214] Indonesia, *Peraturan Pemerintah tentang Pemilikan Rumah Tempat Tinggal atau Hunian oleh Orang Asing yang berkedudukan di Indonesia (Government Regulation regarding Ownership of Residence House or Residence Unit by a Foreigner domiciled within Indonesia*), Peraturan Pemerintah No. 103 Tahun 2015, LN No. 325 Tahun 2015 (Government Regulation No. 103 of 2015, SG No. 325 of 2015).

[1215] Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia,* Loc. Cit., p. 117-118. This opinion is made by Sudargo Gautama in order to give his legal opinion om the acceptance of *renvoi* by Indonesia. However, the author sees that his opinion can be taken and applied at the same time as one of the reasons why Indonesia needs the codification of PIL.

do not meet the sense of justice of the parties involved. If Indonesian judges always use the Indonesian law without a sufficient basis for consideration for all events, it deviates from the purpose of justice that should be given by the court. With clear rules and appointments of Indonesian PIL, judges in Indonesia will be able to provide greater assurance that they make decisions with honest and precise application of the Indonesian law. On the other hand, the involved parties or court even the public can also keep their eyes on the rules and predict the result.

3.2.3 Mixedness of Provisions

Due to the objectives of PIL, Indonesia can adopt mixedness with three distinct techniques to have a balance of legal certainty and flexibility. Indonesia can balance these notions: at the first level, the use of Principle Nationality; at the second level, the use of closest connecting factors; at the third level, the use of escape clauses.

For instance, in the marriage regulation, it states that a marriage is valid if the state in which it is contracted, or in the state in which the parties have the first domicile as husband and wife, treats it as valid. At the second level, the use of "soft" connecting factors constitutes the application of the most closely connected law. At the third level, the use of escape clauses constitutes the exception of the designated law if it is manifestly clear that the circumstances of the case are more closely connected to another law.

Draft of the previous Bills, namely the Bill of 1983, the Bill of 1997, and even the Bill of 2014 before it is revised and becomes the Academic Draft of 2015, applies this approach. The use of closest connecting factors and escape clause needs more adjustment, elaboration and revision due to the development of the situation in Indonesia.

3.3 Scope of Indonesian PIL

The scope of Indonesian PIL covers civil cases and or civil legal relationship which has foreign elements. In this regards, the scope of Indonesian PIL shall cover: (i) the applicable law or choice of law, (ii) the authorised forum and or jurisdiction, (iii) the acknowledgement and recognition of the foreign award.[1216] The first three coverages constitute the ultimate and general scope of PIL as is in another state.[1217] In addition,

[1216] The Bill of 2015 states that the scope of PIL slightly different from the above. It mentions the same scope for the first three matters, but the last one it mentions is the applicable law within a pluralistic national legal system. In relation to this, the author argues that this is covered in *Hukum Antar Golongan* or the interlegal law or Intern Conflict of Laws.

[1217] These topics are confirmed as the topic of Indonesian PIL by Sudargo Gautama. He wrote the Indonesian PIL book series. The series are divided into three parts, the general principles and history of PIL, the personal status and the last one is his opinion on the recognition and enforcement of foreign court awards, respectively as the 7th and 8th book of Indonesian PIL series. In relation to foreign status, see Gouw Giok Siong or

the author would also like to offer that the next Bill of Indonesian PIL can stipulates the personal status of foreigners.

The Nationality Law of Indonesia defines persons who can be referred to as Indonesian nationals and foreigners.[1218] Stateless persons in Indonesia shall be deemed as foreigners.[1219] Foreigners are persons who are not of Indonesian nationality and stateless persons. Foreigners within the territory of Indonesia have their rights, authorities and obligations, which are different from Indonesian Nationals.

Based on *a contrario* interpretation of Art. 16 of AB, Indonesian laws and regulations shall not be applied to foreigners. In practice, there are three possibilities for them: (i) their national law and Indonesian law are applied simultaneously to them; (ii) only their national is applied to them; or (iii) the Indonesian law is applied to them.

The first possibility occurs in intercountry adoption cases. The national law of the foreigners and Indonesian law are applied simultaneously.[1220] The second possibility occurs in international mixed marriages and or capacity of foreigners to enter into contracts. The third possibility occurs when the government regulates that a foreigner can have a plot of land or an apartment in Indonesia for residency.[1221] Those situations show that foreigners can still be foreigners in a sense that Indonesian law shall not apply to them, yet some situations show otherwise whereby Indonesian law is considered to apply. The later situation displays that Indonesian law (which is not the applicable law) becomes the applicable law for a foreigner whereby it gives the foreigner entitlement to certain rights. It is considered different from a situation in which the Indonesian Law becomes the applicable law as the soften (*pelembutan*) application of the Principle of Nationality.

The situation described above will not exist if Indonesia directly applies the Principle of Domicile or Habitual Residence. Moreover, there will be no possibility as mentioned above nor certain rights for foreigners because they are treated equally as Indonesian nationals. Therefore, the author suggests that the legal status of a foreigner constitutes one of PIL matters as it has its portion of discussion and its scope.

Sudargo Gautama, *The Legal Status of Foreigners in Indonesia,* (Jakarta: PT. Kinta Djakarta, 1963). By this book, he was confirming that the status of foreigner is included into PIL.

[1218] Indonesia, *Undang-undang tentang Kewarganegaraan Republik Indonesia (Law regarding Nationality of the Republic of Indonesia),* UU No. 12 Tahun 2006, LN No. 63 Tahun 2006, (Law No. 12 of 2006, SG No. 63 Year 2006. See Art. 4 and 5.

[1219] *Ibid*., Art. 7. *"Setiap orang yang bukan Warga Negara Indonesia diperlakukan sebagai orang asing."*

[1220] Indonesia, *Peraturan Pemerintah tentang Prosedur Pengangkatan Anak (Government Regulation regarding the Procedure of Adoption),* Peraturan Pemerintah No. 54 tahun 2007, LN No. 123 Tahun 2007 (Government Regulation No. 54 of 2007, SG No. 123 of 2007).

[1221] Tiurma M. P. Allagan, *The Facilities to the Foreigners in the Perspective of Indonesian Private International Law,* will be published in forthcoming 2018 edition of Journal of *Indonesian Legal Review*.

3.4 Bill of Indonesian PIL

The first bill of Indonesian PIL was drafted by an academic team chaired by Mr. Teuku Radhi. Sudargo Gautama, a prominent PIL scholar at that time, is one of the members of this team.[1222] This team issued the first bill of Indonesian PIL in 1983.[1223] This bill was further revised in several meetings, was re-issued in 1997 and became known as the "**Bill of 1997**".[1224] This Bill of Indonesian PIL in 1997 again was discussed and became the starting point for preparing an academic draft of Indonesian PIL. The new team of academic draft chaired by I.B.R. Supancana included the apprentice of Sudargo Gautama, Zulfa Djoko Basuki. This team produced the Academic Draft of Indonesian PIL in 2014[1225] which was revised in 2015, hereinafter referred to as the "**Academic Draft of 2015**". [1226] The abovementioned Bill of 1997 and the Academic Draft of 2015 were initiated by the National Law Development Agency (*Badan Pembinaan Hukum Nasional*) under the Ministry of Law and Human Rights of the Republic of Indonesia.

This paragraph will focus on the Bill of Indonesian PIL of 1997, not only because it serves as the general opinion of Indonesian scholars about Indonesian PIL, but it serves as the starting point and basis for Academic Draft of 2015. Therefore, discussion of the Bill of 1997 is equal to discussion of Academic Draft of 2015.

[1222] Sudargo Gautama, *Hukum Perdata Internasional Hukum Yang Hidup,* (translation from author: Private International Law is a Living Law), (Bandung: Penerbit Alumni, 1983), pp. 31-37. See the chapter "*Diperlukan Kodifikasi Dari Hukum Perdata Internasional, Suatu Saran Kepada Badan Pembinaan Hukum Nasional*" (translation from author: *Need for Codification of Indonesian Private International Law, Advice to the National Law Development Agency*). After having considered PIL cases before the courts, Sudargo Gautama gave advice to the National Law Development Agency to draft a PIL act. As an advocate at that time, he met several PIL cases whereby the application of foreign law pursuant to PIL rules was refused by judges. The judges preferred to apply the Indonesian law. Sudargo Gautama encouraged judges in Indonesia to apply the foreign law provided that it is according to the PIL rules. He mentioned that the application of foreign law should not be peculiar, because the application of foreign law in Indonesian courts has existed even before the independence of Indonesia in 1945.

[1223] R.M. Talib. Puspokusumo, S.H. (ed.), *Perencanaan Pembangunan Hukum Nasional Bidang Private International law* (*National Legislation Development Planning in the Field of Private International Law*), (Jakarta: Badan Pembinaan Hukum Nasional, Departemen Hukum dan hak Asasi Manusia RI, 2019), pp. ix-x. The complete text of the Bill of Indonesian PIL of 1983 is available as Attachment I to this book.

[1224] The complete text of the Bill of Indonesian PIL of 1997 is available in the book of Sudargo Gautama, *Hukum Dagang and Arbitrase International (International Commercial and Arbitration Law),* (Bandung: Citra Adhitya Bakti, 1991), Annex 8.

[1225] Tiurma M. P. Allagan, *Indonesian Private International Law, Nederlands Internationaal Privaatrecht NIPR 33/3,* (Den Haag: T.M.C. Asser Press, 2015), pp. 390-403.

[1226] Badan Pembinaan Hukum Nasional, *Naskah Akademik RUU Tentang Hukum Perdata Internasional (Lanjutan),* (Jakarta: Badan Pembinaan Hukum Nasional, 2015), available at http://bphn.go.id/layanan/res_nasmis (butir No. 22), last accessed on October 18, 2017. The main principles in the Bill of 1997 and the Academic Draft of 2015 are similar. As an academic bill, the Academic Draft of 2015 needs further process, namely evaluation by public hearing and approval of the Government of the Republic of Indonesia and the House of Representatives for approval.

3.4.1 Aim of the Bill of Indonesian PIL

Indonesia is strongly influenced by the continental law tradition. The main source of Indonesian law is legislation. Therefore, any lack of legislation shall cause legal certainty. Having a codified legislation on PIL rules will help the parties involved to predict the legal consequences of their legal relationship or acts. In addition, a codified legislation will be useful to settle legal cases involving foreign elements. There is a tendency for the courts to settle cases filed to them based on the Indonesian law even though such cases have foreign elements.[1227] The availability of a codified PIL legislation will require judges and persons involved to consider this legislation before they determine the law governing their legal relationship or act. It will also encourage all practitioners and parties to be fully aware of the nature of PIL cases and to deliberate all international characteristics in those cases in order to obtain the best settlement of such cases or legal relationship.

The situation above is still relevant to date and constitutes the background of the Academic Draft. In addition, there are several backgrounds which stimulate the drafting of new Academic Draft. The first background is the influence of globalisation, including regional cooperation within ASEAN. The second background is the ease of making contact and relationship with another foreign party. In such framework, the Academic Draft of 2015 is put forward to provide legal certainty.[1228] It is a logical consequence of the civil legal system adopted by Indonesia due to its history (Chapter 3.6.2). The author honors this thought because legal certainty is indeed required and is a must to protect legal relations and transactions. It also covers predictability of court decisions.

In line with what has been described in the Academic Draft, the author would also like to offer the objectives as previously discussed, namely decisional harmony and flexibility. Those objectives should also be mentioned in the bill. Legal certainty without any flexibility will result in anarchy. Flexibility is necessary to provide a chance for judges to follow and adjust their decision to the surroundings. It should be part of the authority of judges in order to achieve justice.

3.4.2 General provisions of Indonesian PIL

The Bill of 1997 states the general provisions of Indonesian PIL, which are also stated in the Academic Draft. Due to development of situations and conditions in the preceding

[1227] Ida Sudanti, *Op.Cit.,* pp. 239; Tiurma M.P.A., *Op.Cit.,* p. 390.

[1228] The Academic Draft, consideration point (a), *"bahwa untuk mewujudkan tujuan pembentukan Pemerintahan Negara Indonesia yang melindungi segenap bangsa Indonesia dan seluruh tumpah darah Indonesia serta memajukan kesejahteraan umum, dan mencerdaskan kehidupan bangsa, diperlukan ada jaminan kepastian hukum bagi masyarakat untuk melakukan aktivitasnya dalam rangka globalisasi di berbagai bidang;"* [underline from author]. In the proposal of the same, ASEAN as the regional cooperation is also mentioned as a background.

discussions, it is advisable to take note on particular matters in the Bill of 1997, as discussed below.

3.4.2.1 Position of judges and their authority

Judges have a very strategic position to see or examine the development of the society with respect to PIL rule. Judges become the first guard to observe changes and phenomenon in the society. In conjunction with the discussion, aims and objectives of Indonesian PIL, it is necessary and appropriate if judges have flexibility or competency to interpret PIL principles to settle a case after reviewing or seeing the existing and relevant prevailing regulations. The Galang Island Adoption Case is a good example for this.[1229] Considering this kind of circumstance, the Bill of 1997 states the stipulation in Art. 2 regarding applicable law.

[1229] Adoption in the Galang Island Case is, also known as the "Galang Island Case", a good example for this. The judge employed the principle of "the best interest of children" while the intercountry adoption regulation in Indonesia (at that time) was silent if both parties are foreign nationals. The parties to the case are Canadian nationals and Vietnamese child. See Tiurma M. Pitta Allagan, *Intercountry Adoption in Indonesia*, which will be published in the forthcoming 2018 edition of *Indonesian Journal of International Law*. The decision is described in the Decision of Tanjung Pinang District Court No. 205/Pdt.P./P/N/FPAT dated May 20, 1989. This case started when a Canadian couple, who stayed in Galang Island, Indonesia, submitted a request to adopt a Vietnamese girl before Tanjung Pinang district court. Galang Island (Indonesia) is located south to Batam Island. It was one of the designated places for refugees from Vietnam who came between 1979-1996, called as *"Manusia Sampan"*. UNHCR built camps and facilities to help those refugees which were then closed in 1997. The foster child was a 12-year old Vietnamese girl. Her father was one of the refugees in Galang Island and her mother suffered from mental illness and then committed suicide. The foster parents were Canadian Nationals who have stayed on the same island for a year and 8 months as volunteers of the United Nations. They submitted a request to adopt this Vietnamese girl before the Tanjung Pinang District Court as the authorized district court where both parties had their habitual domicile. The judge stated that this case was a PIL case. As Indonesia at that time has no regulation on adoption whereby both parties are foreigner, the judge considered and referred to the stipulations of The Hague Convention of 1965 (Convention on Jurisdiction, Applicable Law & Recognition Decrees related to adoption, 1965). Even though Indonesia is not a contracting state to such International Convention. The judge mentioned that he had valid legal jurisdiction since both parties had their habitual residence in his jurisdiction, in line with the stipulations stated in Art. 3(a) of such Convention. The judge mentioned that Indonesian law was not the applicable law since both parties were foreigners and they were not domiciled in Indonesia at least for 2 years. The judge then considered that the national law of the parties was the applicable law. The judge considered that the foster child would be taken to Canada by the foster parents, therefore the centre of gravity would be on the foster parents who were Canadian nationals. The judge mentioned that the law of Canada was the applicable law for the case, and solemnization of the adoption would be according to the Indonesian Law, where the legal action was taken. The judge clearly set aside the requirement of Indonesian Law for intercountry Adoption at that time, whereby the foster child shall be at the maximum of 5 years old. It shows that the Canadian Law is applied and considered in this case. After considering the requirements of the Canadian law advised by the Canadian Government, the judge stated that this adoption did not contradict the law of the foster child, in this case, was the Vietnam Law. The request for adoption from the Canadian couple was granted. This case was considered to be a case whereby the principles of intercountry adoption mentioned in the international convention of 1965 were applied correctly, even though Indonesia was not a contracting state. The judge respected and considered the principles of intercountry adoption when he was about to choose the applicable law.

Art. 2 of the Bill of PIL of 1997 states that Indonesian judges must consider other laws and regulations which provide more specific regulations.[1230] This stipulation is relevant because there are laws that have PIL provisions.[1231] If there is no specific regulation in Indonesian regulations, judges must consider the general principles of PIL.[1232] In the implementation of such general PIL principle in a particular case, Indonesian judges are given the authority to interpret such principle by considering the application of this principle in any relevant international convention and/or the common opinion of PIL scholars.[1233] Considering the above, it is advisable that the Academic Draft quotes this provision.

3.4.2.2 Principle of Nationality

The Principle of Nationality is the main principle concerning the applicable law of personal status in the Bill of 1997, in addition to the Academic Draft. It states that the Indonesian law shall be the applicable law to Indonesian nationals who are abroad. On the other hand, foreign nationals in Indonesia are still subject to their national law. However, if the foreign nationals have lived for more than ten consecutive years, the Indonesian law shall apply to them.[1234]

[1230] Art. 2 of the Bill of 1997. *"Apabila tidak ada ketentuan dalam Undang-undang ini atau dalam peraturan perundang-undangan Indonesia lainnya yang mengatur suatu persoalan hukum perdata internasional, asas-asas umum dari Hukum Perdata Internasional berlaku bagi persoalan tersebut."* Translation: "In the event that there is no provision of this Law or of other Indonesian laws and regulations providing for an private international law issue, the general principles of Private International Law shall apply to the issue."

[1231] The regulations of PIL have been developed in a scattered manner in the relevant technical regulations. See Tiurma M. Pitta Allagan, *Indonesian Private International Law: The Development After More Than A Century, Indonesian Journal of International Law* (2017), Vo.14 No. 3, pp. 381-416.

[1232] Elucidation Art. 2 of the Bill of 1997, para. 2-3 '*… Seperti juga lain-lain peraturan yang telah diadakan oleh pembuat undang-undang secara tertulis, dan dalam prakteknya kadang-kadang undang-undang ini tidak dapat mengatur sesuatu masalah atau persoalan hukum secara keseluruhan. Maka dalam hal tersebut untuk menghindarkan adanya sesuatu kekosongan hukum, diterima bahwa akan dipakai asas-asas umum Hukum Perdata Internasional (General Principles of Private International law) untuk menyelesaikan masalah bersangkutan. Tentunya dalam hal ini, bagi hakim atau pelaksana hukum lainnya, diberi kekuasaan untuk menafsirkan apa yang sebenarnya yang diartikan dengan asas-asas umum Hukum Perdata Internasional. Dalam melakukan tugasnya pelaksana hukum harus memperhatikan selain daripada teori-teori umum yang diajarkan dalam text book, juga pendapat para penulis, peraturan-peraturan lain di dalam konvensi-konvensi internasional mengenai hal yang bersangkutan, pendirian dari para sarjana hukum yang khusus berspesialisasi dalam bidang Hukum Perdata Internasional, monografi-monografi, yurisprudensi dan pendapat para sarjana terbanyak (communis opinion doctorum).*'

[1233] Tiurma M. P. Allagan, *Indonesian Private International Law …, Loc. Cit.,* p. 391.

[1234] Art. 13 of the Bill of 1997. *"(1) status dan kewenangan hukum seorang warga negara Indonesia yang berada di luar negeri tunduk pada hukum Indonesia. (2) Status dan kewenangan hukum dari orang asing yang berada di dalam wilayah negara Republik Indonesia tunduk pada hukum nasionalnya. (3)_Status dan kewenangan hukum dari orang asing yang secara terus menerus menetap di Indonesia selama sepuluh (10) tahun tunduk pada hukum Indonesia."* Translation: "(1) Legal status and authority of an Indonesian national who is abroad shall be subject to the Indonesian Law. (2) Legal status and authority of a foreigner who is in the territory of the state of the Republic of Indonesia shall be subject to his/her national Law. (3) Legal status and authority of a foreigner who continuously stays in Indonesia for ten (10) years shall be subject to the Indonesian law."

Further provisions explain this main principle in particular circumstances, for instance, when a person has dual or multi nationalities[1235] and is stateless or *apatride*.[1236] In case of person with dual or multi-nationality, the applicable law is the law appointed by the most effective and active nationality of the person.[1237] If one of the nationalities is Indonesia, then the applicable law is the Indonesian law. In case of stateless person, the applicable law shall the law where the stateless person concerned has his habitual residence.[1238]

The Bill of 1997 lays down a combination of the principle of nationality and the principle of habitual residence. The author notes that in dual nationalities, the effective nationality shall apply, instead of the habitual residence. It is advisable that for dual or multi-nationality cases, habitual residence applies in determining the applicable law. This is, at least, for two reasons. First, it will be consistent with the thought of the main principle of PIL, namely the most connected law. This main principle also justifies the

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[1235] Art. 5 of the Bill of 1997. *"(1) Dalam hal hukum nasional seseorang dinyatakan berlaku, akan tetapi orang tersebut mempunyai dua kewarganegaraan atau lebih, hukum yang berlaku adalah hukum yang ditetapkan oleh kewarganegaraan yang paling efektif dan aktif. (2) Apabila terjadi permasalahan mengenai kewarganegaraan dari seseorang yang mempunyai dua kewarganegaraan atau lebih dan salah satu dari kewarganegaraan tersebut adalah kewarganegaraan Indonesia, hukum yang berlaku adalah hukum Indonesia."* Translation: "(1) In the event that the national law of a person is declared applicable, but the person has two or more nationalities, the applicable law shall be the law stipulated by the most effective and active nationality. (2) In the event of issue of nationality of a person who has two or more nationalities and one of the nationalities is Indonesian nationality, the applicable law shall be the Indonesian law."

[1236] Art. 6 of the Bill of 1997. *"(1) Bagi seseorang yang menurut hukum Indonesia adalah orang yang tak berkewarganegaraan berlaku hukum dari tempat orang tersebut mempunyai tempat kediaman sehari-hari. (2) Ketentuan sebagaimana dimaksud dalam ayat (1) hanya berlaku sepanjang hal itu menyangkut status dan kewenangan untuk bertindak dalam hukum, sedangkan mengenai hal-hal lainnya, orang yang tak berkewarganegaraan dianggap sebagai orang asing."* Translation: "(1) For a person who according to the Indonesian law is a stateless person, the applicable law shall be the law of country in which he/she has his/her habitual residence. (2) The provision as referred to in paragraph (1) shall only apply insofar as it concerns with the status and authority to act by laws, while concerning other matters, a stateless person shall be deemed as a foreigner."

[1237] Elucidation of Art. 5 of the Bill of 1997. *"Apabila ternyata prinsip nasionalitas membawa kesulitan, karena orang bersangkutan mempunyai lebih dari satu kewarganegaraan (kewarganegaraan rangkap, bipatride atau multipatride), maka sesuai dengan pendapat modern, dipergunakan prinsip nasionalitas yang paling efektif, aktif atau yang benar-benar hidup (effective, actieve atau virtuele nationalitiet), yaitu kewarganegaraan yang dapat dibuktikan oleh niatnya, fakta-fakta yang bersangkutan mengenai cara hidupnya dan penerimaan masyarakat sekitarnya."* Translation: "In the event that the nationality principle in fact carries difficulties, because the person concerned has more than one nationality (dual nationality, bipatride or multipatride), according in accordance with modern opinion, the most effective, active or truly operational nationality principle (*effective, actieve atau virtuele nationalitiet)* shall be used, namely nationality which may be by his/her intention, facts related to his/her way of life and acceptance of the surrounding community. "

[1238] Elucidation of Art. 6 of the Bill of 1997. *"Hukum Indonesialah yang harus menentukan apakah seseorang apatride atau tidak. Jika seseorang tidak berkewarganegaraan (apatride), maka mengenai hal-hal yang menyangkut status dan kewenangan dalam hukum keluarga akan dipergunakan hukum dari negara tempat kediamannya sehari-hari (residence habituelle). Akan tetapi mengenai hal-hal lain, orang yang tidak mempunyai kewarganegaraan, tetap berstatus sebagai orang asing."* Translation: "The Indonesian law must determine whether or not a person is stateless. If a person is stateless person (*apatride*), matters related to status and authority in the family law shall use the law of the country of his/her habitual residence (residence habituelle). However, for other matters, a stateless person shall still have the status of foreign person."

stipulation that Indonesian law applies if Indonesian nationality is involved in dual or multi-nationality. It is reasonable and acceptable because the Indonesian law is the most connected law to the judge. Second, the employment of the same shall make the whole stipulation in the Bill consistent with each other. The principle of habitual residence exists in other stipulations, namely Family Matters and Adoption.[1239]

The author agrees and honours the first line stating that the most active nationality shall apply in determining the applicable law. This provision cannot be applied to stateless persons. The last provision displays preference to apply the Indonesian law, which needs further reasonable and objective grounds, to avoid any allegation of judicial chauvinism.

The author honours the application of habitual residence after the application of the main principle, namely the principle of nationality. This principle contains factual contact with the surroundings. In the event of cases of person with dual or multi nationalities or stateless person, there is a high possibility that the application of Indonesian law eases judge's job. In addition, the ASEAN One Community is in the establishment process to be an open society; this principle is in favour of the freedom of movement.

The author would like to take note that in order to avoid any misunderstanding, consistency to apply or use the same terminology in the Indonesian language to refer this concept in the prevailing rules and regulations is necessary, or even, a must. It is advisable if the terminology "habitual residence" equals to "*tempat kediaman sehari hari"* or *"tempat tinggal sehari-hari"*. Meanwhile, the terminology "domicile" which applies both in entity and person should be distinguished. For a person, "*tempat kediaman*" or *"tempat tinggal"* may be applied to refer to the factual presence of the person and or residence.

[1239] For instance, the matrimonial assets in Art. 27 paragraph (2) sub-paragraphs (b) and (c) as well as paragraph (3) of the Bill of 1997. *"(2) Hukum yang dipilih oleh para pihak ialah: … (b) Hukum dari negara yang merupakan tempat kediaman sehari-hari suami atau istri pada saat pilihan hukum dilakukan; atau (c) hukum dari negara yang merupakan tempat kediaman sehari-hari pertama suami istri atau istri setelah perkawinan dilangsungkan."* Divorce in Art. 30 (2). "(2) *Apabila suami istri mempunyai kewarganegaraan yang berbeda tetapi keduanya tinggal di negara yang sama, maka hukum yang berlaku adalah hukum dari tempat kediaman mereka sehari-hari."* Adoption in Art. 39 (2)-(4) of the Bill of 1997: *"(2) Apabila pihak yang mengangkat dan anak yang diangkat mempunyai kewarganegaraan yang berbeda, kemampuan dan syarat-syarat bagi pengangkatan anak ditentukan oleh hukum dari negara tempat anak yang bersangkutan mempunyai tempat kediaman. (3) Akibat hukum dari pengangkatan anak, baik yang mengenai pihak yang mengangkat maupun anak yang diangkat, tunduk pada hukum dari negara tempat anak yang bersangkutan mempunyai tempat kediaman. (4) Hak dan kewajiban antara anak yang diangkat dan keluarga yang melahirkan anak tersebut tunduk pada hukum dari negara tempat anak yang bersangkutan mempunyai tempat kediaman sehari-hari."* Underlines are made by the author.

3.4.2.3 Renvoi

The doctrine of *renvoi* (referral), namely single *renvoi* or remission to the domestic law, is applied according to the Bill of 1997 and the Academic Draft of 2015.[1240] The Indonesian laws and regulations will apply as the applicable law if a foreign law (which has previously been chosen as the applicable law) re-appoints to Indonesian laws and regulations.

This Bill is silent about transmission to another foreign legal system (*penunjukkan lebih jauh*). With respect to it, the author argues that it would be better if the Bill deals with this aspect to avoid any doubts.[1241] In addition, the Bill of 1997 contains no limitation on *renvoi*; it seems that it applies to any PIL cases or PIL legal relationships. However, the author believes that *renvoi* will not be extended to apply to a contractual relationship, even if the Bill of 1997 remains silent in this respect. It can be concluded from the proposal of the Bill which refers to the general opinion of other PIL scholars.[1242]

The author argues that *renvoi* is limited to family matters.[1243] The fact that *renvoi* shall not apply to a contractual relationship is acceptable because the choice of law agreed between the parties is considered to appoint the substantive law only, without the use of PIL rules or any reference to foreign law. This selection leads to the possibility of no *renvoi* or any further transmission. Any application of *renvoi* or transmission in a contractual relationship will result in the rights and obligations of the parties being determined by a different law, instead of that chosen by the parties. This, in the first place, is against the intention of the parties and can go against the expectations of the parties to the relevant agreement.

To avoid any misunderstanding that *renvoi* will be applied in any case involving PIL, it is recommended that the next Bill or its revision can add the limitations of *renvoi*. The limitations as discussed by PIL scholars can be the starting point. For instance, limitations that *renvoi* shall only apply to family matters and that *renvoi* shall not apply to contractual relationships can be included in the next Bill.

Despite the points above, the Bill of 1997 does explicitly demonstrate the acceptance of single *renvoi* in the Indonesian PIL system. It is in line with the common opinion of

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[1240] Art. 3 of the Bill of 1997. *"Dalam hal hukum nasional seseorang dinyatakan berlaku, akan tetapi hukum nasional orang tersebut menunjuk kembali pada hukum Indonesia sebagai hukum yang berlaku baginya, hukum yang diterapkan adalah hukum Intern Indonesia."*

[1241] Sudargo Gautama, *Hukum Perdata Internasional Indonesia Buku Ketiga Jilid kedua (Bagian Kedua),* pp. 159-163.

[1242] Proposal for the Bill of Indonesian PIL 2015, p. 14-15.

[1243] Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia* (translation from the author: Introduction to Indonesian Private International Law), *Loc. Cit,*. p. 101.

Indonesian PIL scholars. As far as the author is concerned, no Indonesian PIL scholar refuses *renvoi*. In this matter, the author agrees with the opinion of Sudargo Gautama that the acceptance of *renvoi* will provide a more precise implementation of Indonesian laws and regulations, as Indonesian judges will certainly know their law better than that of other countries.

In the event that the ASEAN One Community is established and becomes permanent, renvoi shall not be the case when the ASEAN Member States is involved. Therefore, the next Bill should provide provisions for this exception.

3.4.2.4 Public order

Article 4 of the Bill of 1997 deals with Indonesian public order. It provides for when a chosen foreign law applies and it has conflicts with Indonesian public order and moral values, the application of that foreign law can be prevented. Therefore, the Indonesian law shall be applied to settle the case in question. It specifically provides for that a foreign law which should be applied according to the PIL rules of the state will no longer be applied if it contradicts public order and morals (*kesusilaan*).[1244]

3.4.2.4.1 Application of Public Policy

Public policy is one of the classic topics in PIL. Public policy is mentioned as the most important discussion in PIL although it also becomes the darkest topic compared to other topics in PIL.[1245] The Bill of 1997 does not define public order and good morals; in other words, there is no explanation of these provisions/terms. In general, it is accepted that public order must be used as an 'emergency measure' or an *ultimum remedial* of the application of foreign law. It must only apply to an unavoidable situation and when the application of foreign law is an incompatible manifestation of Indonesian fundamental principles. This provision indicates the negative function of public policy.

Without any definition, public order in the Bill of 1997 is, therefore, open to interpretation, and its extent can be very broad. Nevertheless, the court, being the only official institution, which can directly apply this principle, must filter the application of public order when reaching their decisions to avoid judicial chauvinism.

The author agrees that the Bill of 1997 gives no definition to public policy. It is understood and accepted that public policy changes from time to time and depends on

[1244] "*Kaidah-kaidah hukum asing yang seharusnya berlaku menurut ketentuan-ketentuan HPI Indonesia, tidak dipergunakan bilamana kaidah-kaidah asing tersebut bertentangan dengan ketertiban umum dan kesusilaan.*"

[1245] Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia* (translation from the author: Introduction to Indonesian Private International Law), *Loc. Cit,*. p. 101.

values in the relevant society.[1246] However, it is advisable that the bill can give more explanation of the application of public policy. It is necessary to have an elucidation that such exemption is acceptable if such waiver is the absolute requirement and the only way to make settlement according to the Indonesian laws and regulations. Therefore, the application of the foreign law must be manifestly incompatible with the principles of the national law of respective judges, and this condition is mandatory. Public policy cannot be applied to waive the application of the foreign law on the ground that such institution is not recognised in the law of their hands (*lex fori*).[1247] If the application violates public interest and good moral (*kesusilaan baik*) of the community, in which it pierces the sense of justice, fundamental legal system and moral of the respective society, it can be ruled out by the public order.[1248] In this sense, some writings discuss that public order relates to the words order, welfare, security (*keamanan*) and justice. In the Indonesian context, it is commonly believed that *Pancasila* is the basic principles and the source of all legal sources in Indonesia. Therefore, any regulations must be in line with *Pancasila*. In this case, the device of "public policy" aims to safeguard the fundamental values and principles of *Pancasila*.

3.4.2.4.2 Mandatory Rules

The author believes that Indonesia should adopt the concept of "mandatory rules". However, this terminology or concept needs more elaboration in the Indonesian context. Similar to public policy, mandatory rules vary from one legal system to another. The reason is multifold between cultural, historical, political, etc. Classification to specify whether or not the requirements include "mandatory rules" or "public policy" have to be perceived in specific legal contexts.

Nevertheless, this does not mean that no common feature of "mandatory rules" and "public policy" can be found across legal systems. "Mandatory rules" are defined as specific rules designed to protect specific and overriding interests which demand immediate application to whatever cases that fall within their scope. "Public policy" is a device which aims to safeguard the fundamental values and principles of its forum, and which has the effect of excluding the application of a foreign law that will otherwise be applied.

[1246] Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia (Introduction to Indonesian Private International Law), Op.Cit.,* pp. 144-147. See also Sudargo Gautama, *Hukum Perdata Internasional Indonesia, Jilid II bagian 3, Buku ke-empat, Op.Cit,* pp. 64-68.

[1247] See the explanation of Sudargo Gautama in Sudargo Gautama, *Hukum Perdata Internasional Indonesia, Jilid II bagian 3, Buku ke-empat,* p. 42.

[1248] Sudargo Gautama, *Hukum Perdata Internasional Indonesia, Jilid II bagian 3, Buku ke-empat, Op.Cit.,* p. 9.

Public and economic aspects are always connected with mandatory rules.[1249] In explaining "mandatory rules", the import regulation or labour law is stated as the examples. Labour agreement which is exercised in Indonesia cannot be contradicted in any event. In the event of any contradicting provisions in the labour agreement, the provisions of Indonesian labour law shall be applied.[1250] In this regard, the government would like to protect the labour. In fact, the rules mandatorily override, as their application is crucial for safeguarding the political and economic interests of the forum. In the instance above, with respect to legal effects of the mandatory rules (as far as choice of law is concerned), overriding mandatory rules directly replace the otherwise applicable law. The Indonesian law is applied in this matter.

Another example is the applicable law in franchise in Indonesia. In Indonesia, franchise must be performed according to the Indonesian regulation. Furthermore, in the technical relevant regulation, the Indonesian regulation mentions that the Indonesian law applies to them and their franchise.[1251] In this regulation, the author believes that the Indonesian government aims to protect Indonesian franchisees which constitute micro enterprises. In the framework of protection, the Indonesian government requires that each franchise agreement in English language must be translated into Bahasa Indonesia and must stipulate minimal items.[1252]

Both of the examples above show that the Indonesian laws override the rules and regulations with the purpose of protecting unbalanced position of the parties to the contract. The government protects the weaker party to the agreement so that they can have an equal bargaining position and protection during the exercise of the respective agreement.

With respect to legal effects (as far as the choice of law is concerned), the above shows that "overriding mandatory rules" directly replace the otherwise applicable law. Public policy merely rejects the application of the otherwise applicable law without designation of another applicable law.

[1249] Sudargo Gautama, *Indonesia dan Konvensi-konvensi Hukum Perdata Internasional,* (Bandung: Alumni, 1983).

[1250] Art. 51 (2) of Law No. 13 of 2003 regarding the Labour Law. *"Perjanjian kerja yang dipersyaratkan secara tertulis dilaksanakan sesuai dengan peraturan perundang-undangan yang berlaku."*

[1251] Art. 4 (1) of Government Regulation No. 42 of 2007 regarding Franchise. *"Waralaba diselenggarakan berdasarkan perjanjian tertulis antara pemberi Waralaba dengan Penerima Waralaba dengan memperhatikan hukum Indonesia."* Such regulation shall be read in conjunction with Art. 5 (1) of Regulation of the Minister of Trade No. 31/M-DAG/PER/2008. *"Waralaba diselenggarakan berdasarkan perjanjian tertulis antara pemberi waralaba dan penerima waralaba dan mempunyai kedudukan hukum yang setara dan terhadap mereka berlaku Hukum Indonesia."* Furthermore, the registration is subject to a registration in the Trade Office.

[1252] Art. 5 of Government Regulation No. 42 of 2007 regarding Franchise. A Franchise agreement at least must cover the identification of the parties, intellectual property involved, characteristic of the business, location and area of business, provision of training, facilities, operation, maintenance, management and marketing, period, fee, dispute settlement, extension or termination of the agreement.

In common practice or general, the result of excluding the *lex causae* by way of public policy will almost always lead to the application of the *lex fori*. Thus, "overriding mandatory rules" serve as a sword in that it has a positive effect (of demanding application), whereas "public policy" serves as a shield in that it has a negative effect (of excluding application).

3.4.2.4.3 Public Policy, Mandatory Rules and Marriage

With respect to marriage, it is necessary to consider the legal effect of public policy and mandatory rules. The limitation of mandatory rules is about to protect a specific legal interest, while public policy is for greater interest as well as good morals.

The principles of monogamy and voluntary in marriage are the basic requirements of marriage, of course, in addition to the age of the parties. It seems to fall also within the public policy device, instead of mandatory rule device. According to the author, this application does not require mandatory rules because the aim is to protect the general yet basic value of marriage.

The aim of protecting the fundamental philosophies of marriage is crucial. Although, some opinions may say that with respect to the scope of application, both devices may sometimes overlap (frequency and rarity of such situation vary from one country to another), there are cases which fall within the scope of a mandatory rule but do not trigger the device of public policy. It is the case where specific legal interests are considered so fundamental to be part of public policy, instead of given mandatory rule. In addition, in this case, public policy is invoked to exclude the (foreign) law to apply the law of the forum, whereby no mandatory rule is in place to demand application.

An example of this case is a marriage concluded abroad or outside the territory of Indonesia where there is a possible contradiction with the Indonesian law. For instance, a same-sex marriage is validly or officially recognised in the country in which it takes place, but it cannot be acknowledged and registered in Indonesia. In this situation, the public presents the ground to refuse the recognition of such marriage and its legal consequences.

Due to the above, it is advisable to include and distinguish these two devices, public order and mandatory rules, in the next bill.

3.4.2.5 Classification or qualification

The Bill of 1997 appoints the Indonesian law as the applicable law (the *lex fori*) in order to determine the legal category of any PIL case.[1253] The Bill does not take into consideration the substantial or real connection of facts in the respective case or the division of substantive and procedural matters as well as the *lex cause* of the classification. Any classification is undertaken based on the principles of the *lex fori*.

The provision above is acceptable, but it is advisable to state that such stipulation must be understood and applied while bearing in mind that the case in question is a PIL case. Therefore, it cannot be settled as a domestic case. The foreign law that is connected to the respective case must not be abandoned, nor become the only or ultimate source of classification. It must be used side by side with the *lex fori* to understand the international characteristics of the relevant case.[1254]

3.4.3 Family matters

Family matters are regulated in Chapter V of the Bill of 1997; the articles therein cover international mixed marriages, marital properties, prenuptial agreement, divorce, marriage annulment, relationship between parents and their children and guardianship, as well as adoption. However, this sub-chapter will discuss only marriage provisions and proposal of Habitual Residence, as relevant.

3.4.3.1 Marriage

The Bill of 1997 states that the substantive requirements for a marriage are subject to the law of nationality of the couple-to-be, provided that the national law of the country in which the marriage takes place does not state otherwise.[1255] In relation to the solemnization of marriage and procedural requirements, it shall apply the law of the

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[1253] Art. 7 of the Bill of 1997. "*Apabila di dalam suatu sengketa di muka pengadilan Indonesia hukum asing yang harus berlaku, akan tetapi antara hukum asing yang bersangkutan dan hukum Indonesia terdapat perbedaan kualifikasi, kualifikasi hubungan hukum tersebut ditentukan berdasarkan hukum Indonesia.*" Translation from the author: "In the event that a foreign law must be applicable in a dispute before an Indonesian court, but between the foreign lawn concerned and Indonesian law, there is a difference in qualification, the qualification of the legal relationship shall be determined based on the Indonesian law."

[1254] Tiurma M. P. Allagan, *Indonesian Private International Law, Op.Cit.,* p. 393.

[1255] Art. 22 of the Bill of 1997. *"(1) Syarat-syarat materiil perkawinan ditentukan oleh hukum nasional masing-masing pihak yang melangsungkan perkawinan. (2) Ketentuan ayat (1) , sepanjang hukum nasional tempat melangsungkan pernikahan tidak menentukan lain."* Translation from the author: "The material requirements for marriage shall be determined by the national law of each party holding the marriage. (2) The provision of paragraph (1), insofar as the national law of place in which the marriage is held does not provide for otherwise."

country in which the marriage takes place *(lex loci celebrationis)*, but the Indonesian national at the same time must consider or be subject to the Indonesian marriage law.[1256]

Those principles, the Principle of Nationality and *lex loci celebrationis* are recognised in MA 1974.[1257] Both stipulate that a marriage which takes place abroad shall be valid if solemnization is according to the local law, provided that such marriage does not contradict MA 1974. The same principle applies to a marriage between an Indonesian national and foreign national solemnised in Indonesia, which shall be valid if its solemnization is according to MA 1974.[1258]

The same principle is applied to a marriage of Indonesian nationals which is held abroad in the Indonesian Representative Office. This regulation uses the extraterritorial authority of the Indonesian Representative Office. Therefore, such marriages is considered solemnised within the territory of Indonesia. These regulations are embodied in the Joint Ministerial Decree of the Minister of Religious Affairs and the Minister of Foreign Affairs No. 589 of 1999 and No. 182/OT/99/01[1259] Within a year after returning to Indonesia, the couple must register their marriage in the Civil Registration Office in Indonesia.[1260]

[1256] Art. 23 of the Bill of 1997. *"(1) Perkawinan adalah sah apabila dilangsungkan sesuai dengan syarat-syarat formal yang ditentukan oleh hukum negara tempat perkawinan dilakukan. (2) Perkawinan antara: (a) warga negara Indonesia dan warga negara Indonesia dan (b) warga negara Indonesia dan warga negara asing, yang dilangsungkan di luar negeri adalah sah jika memenuhi syarat-syarat formal yang ditentukan oleh hukum Indonesia. (3) Perkawinan antara (a) warga negara Indonesia dan warga negara asing; dan (b) warga negara asing dan warga negara asing, yang dilangsungkan di Indonesia adalah sah jika memenuhi syarat-syarat formal yang ditentukan oleh hukum Indonesia.* See the Elucidation of Art. 23 (2), *"Warga negara yang menikah di luar negeri, masih harus memperhatikan syarat-syarat formal yang ditentukan oleh hukum Indonesia. Hal ini sudah lama dianut dalam praktek hukum berdasarkan Pasal 16 AB serta Pasal 10 Stb.1898:158 mengenai Peraturan Perkawinan Campuran."* Translation: A national who is married abroad, must still take into account the formal requirements determined by the Indonesian law. It has been adopted for a long time in legal practise based on Article 16 of AB and Article 10 of *Stb.*1898:158 regarding Mixed Marriage Regulation.

[1257] Art. 56 of MA 1974. *"56. (Perkawinan di luar Indonesia) (1) Perkawinan yang dilangsungkan di luar Indonesia antara dua orang warganegara Indonesia atau seorang warganegara Indonesia dengan warganegara Asing adalah sah bilamana dilakukan menurut hukum yang berlaku di negara di mana perkawinan itu dilangsungkan dan bagi warganegara Indonesia tidak melanggar ketentuan-ketentuan Undang-undang ini. (2) Dalam waktu 1 (satu) tahun setelah suami isteri itu kembali di wilayah Indonesia, surat bukti perkawinan mereka harus didaftarkan di Kantor Pencatatan Perkawinan tempat tinggal mereka."*

[1258] Indonesia, *Undang-undang tentang Perkawinan (Law regarding Marriage),* Art. 59 (2).

[1259] Indonesia, *Surat Keputusan Bersama Menteri Agama dan Menteri Luar Negeri tentang Petunjuk Pelaksanaan Perkawinan Warganegara Indonesia di Luar Negeri (Joint Decree of the Minister of Religious Affairs and Minister of Foreign Affairs regarding Implementing Guideline on Marriage between Indonesian Nationals Abroad) Surat Keputusan Bersama Menteri Agama dan Menteri Luar Negeri No. 589 Tahun 1999 No. 182/OT/99/01 tertanggal 13 Oktober 1999* (Joint Decision of the Minister of Religious Affairs and Minister of Foreign Affairs No. 589 of 1999 and No. 182/OT/99/01 dated October 13, 1999).

[1260] Indonesia, *Peraturan Menteri Agama tentang Pendaftaran Surat Bukti Perkawinan Warga Negara Indonesia Yang Dilangsungkan di Luar Negeri (Regulation of the Minister of Religious Affairs regarding Registration of the Certificate of Marriage between Indonesian Nationals Held Abroad), Peraturan Menteri Agama No. 1/1994 tertanggal 2 April 1994* (Regulation of Minister of Religious Affairs No. 1/1994 dated April 2, 1994).

The provisions above are in line with the provisions of MA 1974, whereby the Principle of Nationality determines the applicable law of the bride and groom. However, it is advisable if the Habitual Residence of a foreign national should be considered to soften the application of the Principle of Nationality. Therefore, the Indonesian law can be applied to foreign nationals who either have a permanent residence permit or habitual residence in Indonesia.

MA 1974 stipulates two types of marriage with foreign elements. The first type is a mixed marriage, namely a marriage in Indonesia between a couple who are subject to different laws, due to different nationalities, while one of them is an Indonesian.[1261] The second type is a marriage concluded abroad between an Indonesian couple.[1262] While a marriage between Indonesian nationals which takes place in the Indonesian Embassy and a marriage between foreign nationals in Indonesia are not stipulated in another regulation.[1263] It is advisable if the next bill can regulate those marriages.

It is worth to note that the Academic Draft introduces new provisions in the fourth paragraph which is different from the previous bills. According to this provision, public policy continues to apply even though the marrying couple intentionally leave their domicile to avoid the regulation which should apply to them. It seems that this provision attempts to deal with any evasive action, interfaith mixed marriage between Indonesian couples which takes place abroad.[1264] This can be the answer to validity of an interfaith

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[1261] Art. 57 of MA 1974. "57. *Yang dimaksud dengan perkawinan campuran dalam Undang-undang ini ialah perkawinan antara dua orang yang di Indonesia tunduk pada hukum yang berlainan, karena perbedaan kewarganegaraan dan salah satu pihak berkewarganegaraan Asing dan salah satu pihak berkewarganegaraan Indonesia.*"

[1262] Art. 56 of MA 1974. "56. *Perkawinan yang dilangsungkan di luar Indonesia antara dua orang warga negara Indonesia atau seorang warga negara Indonesia dengan warga negara Indonesia dengan warga negara Asing adalah sah bilamana dilakukan menurut hukum yang berlaku di negara di mana perkawinan itu dilangsungkan dan bagi warga negara Indonesia tidak melanggar ketentuan-ketentuan Undang-undang ini.*"

[1263] A marriage between Indonesian nationals in an Indonesian Embassy is stipulated in *Surat Keputusan Bersama Menteri Agama dan Menteri Luar Negeri No. 589 Tahun 1999 No. 182/OT/99/01 tertanggal 13 Oktober 1999* (Joint Decision of the Minister of Religious Affairs and Minister of Foreign Affairs No. 589 of 1999 and No. 182/OT/99/01 dated October 13, 1999). The Civil Administration Law only states that these marriages can be registered in an Indonesian Civil Registry if the couple wishes to do so. See Art. 35 of Law No. 23 of 2006 regarding Civil Administration, State Gazette No. 124 of 2006, Supplement No. 4674, as amended to date. "*Pencatatan Perkawinan sebagaimana dimaksud dalam Pasal 34 berlaku pula bagi: (a) perkawinan yang ditetapkan oleh Pengadilan; dan (b) perkawinan Warga Negara Asing yang dilakukan di Indonesia atas permintaan Warga Negara Asing yang bersangkutan.*" Translation from the author: "The marriage registration as referred to in Article 34 shall also apply to: (a) marriage stipulated by a Court; and (b) marriage of Foreign Citizens which is held in Indonesia upon request of the Foreign Citizens concerned."

[1264] *"Hal ini (Ketertiban Umum) berlaku pula apabila para pihak telah meninggalkan tempat tinggal mereka dengan tujuan agar supaya tidak takluk di bawah formalitas-formalitas dan undang-undang yang berlaku di sana."* (Brackets are from the author). Translation from the author: "It (Public Order) also applies if the parties have left their residence for the purpose of not being subject to the formalities and laws applicable there."

marriage which takes place abroad, although the evasion must be proven at the first place.[1265] With respect to this matter, the author holds the advice from the Supreme Court Judge in Andi Voni Gany case, that the government must create a way for those interfaith mixed marriage couples. The government should facilitate this necessity from its society.

Having discussed other marriages which have a foreign element (Chapter 3.3 and Chapter 3.4), it is advisable if the next bill stipulates or gives reference to the applicable law and the prevailing rules and regulations. In addition, the next bill can include other marriages, for instance, marriage between refugees. Due to the tendency towards habitual residence, it is advisable that the Indonesian law can be applied to stateless persons and refugees, or in case of refugee, the law of destination state of the refugee, as relevant, can be applied.

3.4.3.2 Marital assets and prenuptial agreements

The provisions on marital assets are provided in Art. 26-29 of the Bill of 1997. The provisions on marital assets cover joint marital assets, *harta bawaan*,[1266] and separated assets.

The Bill of 1997 and the Academic Draft state that marital assets of a couple who have the same nationality are subject to their national law. If the national law of a couple (of the same nationality) allows the couple to enter into a marital agreement, their matrimonial asset shall be subject to their marital agreement. In this case, their agreement must be in line with the requirements and provisions of their national law.[1267] A couple of different nationalities can make a choice of law in their marital agreement. However, the choice of law is limited to one of their national laws when the choice is made, law of the state in which the husband or wife has habitual residence

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[1265] Some scholars are of the opinion that an interfaith marriage is forbidden in Indonesia according to Art. 2 of MA 1974, while some scholars believe that MA 1974 says nothing on this or remains silent according to Art. 2 in conjunction with Art. 57 of MA 1974. Thus, it results in legal vacuum in relation to interfaith marriage.

[1266] Elucidation of Art. 26 (1) of the Bill of 1997. "*Yang dimaksud dengan Hukum Harta Benda Perkawinan ialah semua ketentuan hukum mengenai harta benda suami istri, baik yang mengenai harta bersama, harta bawaan maupun harta terpisah. Dalam hal suami istri berkewarganegaraan sama, maka akan dipakai hukum nasional mereka.*" Translation from the author: "Marital Property Law shall be all legal provisions on the property of a spouse, either regarding joint property, *harta bawaan,* and separate property. In the event that a spouse have the same nationality, their national law shall be used." *Harta bawaan* is assets owned by each of the spouse before the marriage is concluded.

[1267] Art. 26 of the Bill of 1997. *"(1) Hukum harta benda perkawinan antara suami istri yang berkewarganegaraan sama diatur oleh hukum nasional mereka pada saat perkawinan dilangsungkan. (2) Apabila berdasarkan hukum nasionalnya suami istri dapat mengadakan perjanjian perkawinan, ketentuan mengenai harta benda mereka tunduk pada perjanjian tersebut."*

when the choice is made or law of the state in which they have their first habitual residence after the solemnization of their marriage.[1268]

The provisions above can close the gap in a marital agreement between international mixed marriages in Indonesia not stipulated in MA 1974. The author agrees and supports the provisions above stating that parties have the freedom to choose the law applicable to their matrimonial assets provided that the choice of law has a real connection and or the closest connection with the relevant couple.

This provision reflects that Indonesian PIL (actually) allows the freedom to choose the applicable law in the field of family matters, in addition to contractual relations or other fields. A chance is at least open in the fields of matrimonial assets, succession, in particular in will or alimony. The author supports that that this freedom is limited to the law that has a real connection and or the closest connection to him/her due to the avoidance of any evasion or fraud (*penyelundupan hukum*). It is important that the bill of Indonesian PIL has these provisions. Nevertheless, it is also advisable to provide for the limitation to agreement, for instance whether or not assets of a couple located abroad shall be subject to a marital agreement.

With respect to a decision of the Supreme Court on marital agreement as previously discussed in Sub-chapter 2.2.6 (Matrimonial Assets), the author would like to draw attention to an agreement which is signed after a marriage is concluded. For the avoidance of doubt, it is also advisable to stipulate provisions as to whether or not a marital agreement is retroactive and or is effective as of the date of commencement. The author would like to also mention about the coverage of agreement. It is advisable to limit the agreement to only cover marital assets and things during a marriage, instead of the division of assets in the event of divorce. It is necessary to be in line with the purpose and objective of marriage, namely it should be for the rest of life of the couple concerned. No party to a marriage should think what if a divorce occurs between them.

[1268] Art. 27 of the Bill of 1997. *"(1) Harta benda dalam perkawinan dari suami istri yang berbeda kewarganegaraan diatur oleh hukum yang dipilih oleh para pihak. (2) Hukum yang dipilih oleh para pihak ialah: (a.) hukum nasional suami atau istri pada saat pilihan hukum dilakukan; (b.) Hukum negara yang merupakan tempat kediaman sehari-hari suami atau istri pada saat pilihan hukum dilakukan; atau (c.) Hukum dari negara yang merupakan tempat kediaman biasa sehari-hari pertama suami dan istri setelah perkawinan dilangsungkan. (3) Apabila para pihak tidak mengadakan pilihan hukum, hukum yang berlaku adalah hukum intern dari negara yang merupakan tempat kediaman sehari-hari pertama dari suami istri."* Translation from the author: "(1) Marital assets of a spouse of different nationalities shall be provided for by the law chosen by the parties. (2) The law chosen by the parties shall be: (a.) national law of the spouse when the choice of law is made; (b.) law of the state which constitutes the habitual residence of the spouse when the choice of law is made; (c.) law of the state which constitutes the first habitual residence of the spouse after the marriage is held. (3) In the event that the parties do not make any choice of law, the applicable law shall be the internal law of the state which constitutes the first habitual residence of the spouse."

In general, Indonesia can also consider international conventions on the same matter from the Hague Conference and or other model laws.

3.4.3.3 Legitimacy of children from an international mixed marriage

The Bill of 1997 states that the legitimacy of children is subject to the national law of their father, legal husband of their mother. If their father has passed away when they are born, the applicable law is the national law of their father when he passes away. The national law of the father also applies to denial of children's legitimacy.[1269] Rights and obligations between parents and legitimate children are subject to the national law of the father. Children of unmarried women are subject to the national law of their mother.[1270] The legitimation of children is subject to the national law when such legitimation is held. If, at the moment the legitimation is made, the father has passed away, the applicable law is the national law of the father when he passes away.[1271]

The author is of the opinion that these provisions need to be reassessed and further researched, due to the conditions and prevailing regulations in Indonesia. Children from a mixed marriage are entitled to acquire the nationality from both sides, the father and mother. The reasons for CEDAW, gender equality, and even more, protection of the best interest of children must serve as the centre of background of these provisions.

If the Principle of Nationality is applied, national laws of both the father and mother are applied. However, considering tendency towards the law of country in which the person concerned has habitual residence, the provisions above need to be adjusted for consistency. Therefore, it is advisable that in the situation described in each article, the

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[1269] Art. 33 of the Bill of 1997. *"(1) Sah tidaknya seorang anak diatur oleh hukum nasional dari suami dari ibu anak yang bersangkutan pada saat anak itu dilahirkan. (2) Apabila pada saat anak dilahirkan, suami tersebut telah meninggal dunia, sah tidaknya anak tersebut ditentukan oleh hukum nasional suami tersebut pada saat ia meninggal. (3) Hukum nasional suami tersebut berlaku pula bagi gugatan tentang penyangkalan sah tidaknya seorang anak."* Translation from the author: "(1) The legitimation of a child shall be provided for by the national law of husband of the mother of the child concerned when the child is born. (2) In the event that when a child is born, the husband has passed away, the legitimation of the child shall be determined by the national law of the husband when he passes away. (3) The national law of husband also applies to claim of denial of legitimation of a child."

[1270] Art. 34 of the Bill of 1997. *"(1) Hak dan kewajiban antara orang tua dan anak sah tunduk pada hukum nasional ayah. (2) Apabila seorang anak dilahirkan dari seorang wanita yang tidak menikah, hak dan kewajiban antara ibu dan anak tunduk pada hukum nasional dari wanita tersebut."* Translation from the author: "(1) Rights and obligations between parents and legitimate children shall be subject to the national law of the father. (2) In the event that a child is born from an unmarried woman, rights and obligations between the mother and child shall be is subject to the national law of the woman."

[1271] Art. 35 of the Bill of 1997. *"(1) Pengesahan anak tunduk pada hukum nasional ayah pada saat pengesahan dilakukan. (2) Apabila pada saat itu ayah tersebut telah meninggal, hukum yang berlaku adalah hukum nasional dari ayah pada saat ia meninggal."* Translation from the author: "(1) Child legitimation shall be subject to the national law of the father when such legitimation is made. (2) In the event that at that time, the father has passed away, the applicable law shall be the national law of the father when he passes away."

applicable law shall be the local law of country in which children have their habitual residence, and any exception may only be made for the best interest of the children.

3.4.3.4 Guardianship

Any guardianship of minors is subject to the national law of the minors concerned but also considering their best interests. The only exception to the principle above is for immovable assets of minors which are subject to the law of state in which the assets are situated.[1272] Any revocation of guardianship and also obligations of guardianship of minors are subject to the law of state in which the minors have their habitual residence.

In this respect, the author honours those stipulations. It is consistent with the Principle of Nationality, yet it considers balancing with other principles namely the best interest of children and also, other PIL principle, *lex re sitae.* Thus, it is advisable to maintain this principle in the next bill of Indonesian PIL.

3.4.3.5 Recognition of Marriage concluded abroad and its registration

MA 1974 stipulates marriage recognition while the Civil Administration Act stipulates marriage registration. It can be concluded that marriage recognition is different from marriage registration. It is not equal one to another. The author argues that a marriage concluded abroad and registered with the Civil Administration Office is recognised by the Indonesian law. In the registration process, the Civil Administration Office examines documents serving as marriage evidence before conducting the registration. Therefore, the recognition of marriage concluded abroad is silently made by the government through marriage registration with the Civil Registration Office until it is proven otherwise for a fundamental reason.

In PIL, this is in line with vested rights. Rights and obligations obtained abroad shall continue even after the couple concerned cross the border of the nation. Thus, it is advisable if the next bill of Indonesian PIL can clarify and confirm this situation. Indonesia can also consider recognising marriage if it has been recognised by one of the ASEAN Member States to a certain extent.

[1272] Art. 36 of the Bill of 1997. *"(1) Perwalian bagi anak di bawah umur, alasan-alasan bagi perwalian, kekuasaan dan kewajiban wali terhadap anak di bawah umur, tunduk pada hukum nasional anak tersebut. (2) Kekuasaan seorang wali, sepanjang berkenaan dengan benda tak bergerak, tunduk pada hukum dari negara tempat benda tak bergerak tersebut terletak."* Translation from the author: "(1) Guardianship for minors, reasons for guardianship, authorities and obligations of guardian to minors, shall be subject to the national law of the minors concerned. (2) Authorities of a guardian, insofar as related to immovable assets, shall be subject to the law of state in which the assets are situated."

Indonesia can carefully consider what kind of marriage that it would like to recognise at the first place and make exception(s). It is to avoid the recognition of a marriage which contradicts the basic values of Indonesian marriage.[1273]

3.4.4 Transitional Provisions

Referring to the discussion in the previous chapter (Chapter 3.6.6.2) and examination of the development of Indonesian PIL; there are prevailing laws and regulations that contain the provisions on foreign elements. Such particular laws and regulations are applied as the specific or technical law, and they are in accordance with the "*lex specialis derogate lex generalis*". In addition, there are several international conventions to which Indonesia becomes a contracting state, thus the provisions are binding and effective. Indonesian legislators must be careful in formulating articles of the applicable law, particularly when they are related to a field which already has an act.

The formulation of articles of the next bill is essential and must be prudent. It is crucial to avoid any contradicting and or incompatible provision. For the avoidance of doubt, it is advisable to stipulate that Art. 16, 17, and 18 of AB no longer prevail along with the existing provisions which contradict the next bill of Indonesian PIL.

3.5 Ratification of international conventions and or bilateral agreements

Indonesia is a contracting state of several international conventions on PIL, among others, the New York Convention and Washington Convention. In relation to trade, Indonesia is a Contracting state to GATT, with respect to Intellectual Property Rights, the Bern Convention, Paris Convention and Lisbon Convention, while for aviation, the Cape Town Convention. It shows that Indonesia has no favour to the approach of convention, neither unification or harmonisation.

The author honours that Indonesia is an observer to the Hague Conference on the Private International Law, although it is advisable that Indonesia becomes one of the member states. With this position, Indonesia can follow the development of PIL principles happening in the world. The above constitutes a good condition showing the involvement of Indonesia in the international society.

4 Synthesis: Recommendation to ASEAN and Indonesia

The main points of the discussion above are:

1. The ASEAN One Community is possible, but it needs a lot of work from each ASEAN Member State.

[1273] For instance, same sex marriage.

2. PIL takes a lot of portion in encouraging the ASEAN One Community. One basic principle of PIL shall be the milestone to work together, namely equality of law of each ASEAN Member State. This principle must serve as the bedrock of ASEAN cooperation, now and in the future. Any exception can be made based on reasonable and fundamental reasons.
3. Legal certainty shall be one of the objectives in the legal framework of the ASEAN One Community, including predictability, prevention of limp relationships and reduction of the risk of forum shopping. ASEAN must strive for this to serve the protection of stability interest. Fundamental union based on freedom can be ensured if the exercise of freedom does not involve the loss of legal position that has already been acquired in another member state.
4. The objective of legal certainty shall involve unification and or harmonization of PIL rules, but achievement of the aim of unification of PIL rules as such and at all cost shall never be a goal in itself.
5. Coordination of common rules of PIL is suitable for ASEAN in relation to the establishment of the ASEAN One Community. On the one hand, each member state can maintain its cultural values in its national laws. Therefore, their sensitive issue shall not be intruded. On the other hand, when a member state deals with a marriage with an international element or PIL marriage, the ASEAN Member State will appoint the same applicable law.
6. In relation to solemnization, the ASEAN Member States have the same principle, namely *lex loci celebrationis*. In this regard, all ASEAN Member States are in consensus to apply the local law of country in which the marriage takes place.
7. Recognition of marriage is needed as proven by a marriage certificate or any other public documents. The form of recognition is usually civil registration held by an authorised state institution designated for such purpose. Recognition of marriage is the continuance of rights and obligations of marriage in states that should remain exist in another country. This field is also not free from issues, such as, legalisation and or apostille, language, etc.
8. In achieving those objectives, ASEAN can make several efforts like other regional cooperation or international organisations do. There are possible attempts that can be assessed by ASEAN, namely unification in substantive rules and the terms of harmony of the conflict of law rules, collaboration in two-level cooperation, namely legislation and enforcement of law.
9. Indonesia in entering the ASEAN community needs to prepare its prevailing rules and regulations. It needs a due diligence to avoid any contradiction in the future. In relation to PIL rule, Indonesia needs to speed the Bill of PIL and particularly, the legal policy of PIL.

10. Indonesia needs to determine its objectives and methods in its PIL Rules. The Bill of 1997 needs to be further detailed and to observe the development of personal status issues and subsequently, to be enacted.

Chapter 8
Conclusions and Recommendations

The final chapter of this writing summarizes the conclusions of issues, which have been discussed in the earlier chapters. The preceding discussion covers marriage laws of the ASEAN Member States and ASEAN itself as well as the situation which will probably change in the future in order to establish the ASEAN One Community.

This chapter comprises of two main parts, namely conclusions drawn from each chapter and recommendations. Those conclusions, which serve as the foundations of recommendations for Indonesia and ASEAN, shall be the first main part. Further, the second main part shall be recommendations for Indonesia and ASEAN.

1 Conclusions

After having discussions in the previous chapters, the author draws conclusions which can be divided into two parts. First, the conclusions of marriage law in Indonesia and, second, the conclusions of comparison of marriage laws of the ASEAN Member States.

ASEAN legislators prepared some provisions to encourage the ASEAN One Community. Free movement within ASEAN in the framework of AEC allows ASEAN nationals to move within ASEAN Member States in order to find a job or for other professional reasons. This movement is also to support the vision of ASEAN Connectivity by 2025. These chances create more possibilities for nationals of the ASEAN Member States to make a contact or relationship, professionally or personally. Personal relationship may end with a marriage that creates a contact between ASEAN legal systems. These couples have the right to marry in the framework of human rights as stated in the ASEAN Charter. Ideally, their marriage should be equally protected wherever they live and any differences between the legal systems shall not raise any question to the status or any limp relation of their marriage.

Therefore, this dissertation is aimed at looking for the possibility to unify and or harmonize marriage laws among the ASEAN Member States to support the ASEAN One Community in 2025. In the framework of such objective, this dissertation has provided description of the marriage law of Indonesia (Chapter 2 and 3). It also describes the development of ASEAN and objectives of the ASEAN One Community 2025 (Chapter 4). This dissertation describes marriage laws of the ASEAN Member States and their comparison with the Indonesian marriage law. It describes similarities and differences amongst them as well as international conventions related to marriage and or right to marriage in the framework of human rights (Chapter 5 and 6). It also

examines the possible approach and means that ASEAN can adopt to support the ASEAN Sociocultural One Community, in particular, the field of marriage law (Chapter 7). After having detailed discussion and review of the above-mentioned issues, the author comes to the following conclusions.

1.1 MA 1974 and Indonesian Marriage Law

The author concludes that MA 1974 is the written marriage law of Indonesia at the national level. MA 1974 is the prevailing marriage law in Indonesia, replacing the former marriage laws that were applied in the society at that time. The *Adat* law, known as the non-statutory law and interpreted as the genuine law rooted from traditional customs and basic culture of Indonesia, enriches MA 1974. It becomes one of the resources of marriage law of Indonesia through district court decisions.

There are some amendments to MA 1974 based on Constitutional Supreme Court decisions, namely premarital agreement and rights of children born out of wedlock. There were other claims against MA 1974 before the Constitutional Supreme Court, but they were not granted, for instance, request to increase the minimum age of brides, request to allow a polygamous marriage without any prior district court decision, and request to allow an interfaith mixed marriage.

MA 1974 defines a marriage as a physical and spiritual relationship between a man and woman as husband and wife in order to create an eternal happy family, based on the Almighty God. It shows that a marriage according to MA 1974 is more than a civil relationship as it contains religious or sacred values.

Based on the definition of marriage, MA 1974 sets out the essential and basic issues which become its principal characters. First, a marriage is based on mutual consent of the couple to prevent a forced or arranged marriage (*kawin paksa*). Second, MA 1974 adopts a limited monogamous system which gives a chance to a man to practice polygamy with strict requirements, so a woman will not easily become a co-wife. This definition also limits a marriage in Indonesian only to a heterosexual couple. MA 1974 has the requirement of minimum age to enter into a marriage for the reason of maturity of the couple. The requirement is aimed at preventing child marriage and divorce as well as at controlling the population. A husband and wife have an equal position; therefore, each of them has equal rights and obligations as well as capability to take any legal actions. The last character is that a marriage must be registered with a Registry Office to provide legal evidence of the marriage concerned.

The definition reflects the principle of monogamy due to the limitation to a relationship between a man and woman at the same time. It shows that a man must marry a woman, not with some women at the same time and it is applied vice versa. Polygamous and or polyandry marriages are, therefore, forbidden in Indonesia. However, polygamy is not

absolutely forbidden, due to limitation in several articles in MA 1974, which allow a man to have more than one wife for particular reasons. The principle of monogamy in MA 1974 can be referred to as limited or open monogamy, instead of absolute monogamy.

MA 1974 allows a polygamous marriage under particular circumstances. In the event that a husband has an intention to have more than one wife, he has to submit a request to a local district court where he lives. Upon such request, the relevant district court shall give permission, or to the contrary, refuse the request. The court can give permission for polygamy only for certain reasons as mentioned in MA 1974, namely if the existing wife cannot perform her obligations as a wife, suffers from a physical disability, has an incurable sickness or cannot give any birth. Before giving the permission, the relevant district court is obligated to ask whether or not his existing wife (wives) agrees to be a co-wife. In addition, the husband must provide a guarantee that he is able to afford the necessity of his existing wife (wives) and all of his children and a commitment that he will treat his wife (wives) and children in an equal, fair and just manner.

The objective of a marriage is to create an eternal happy family based on the Almighty God or on religious ground. The last phrase of the definition makes a marriage in Indonesia to be always related to spiritual or religious aspect. For instance, it is reflected in the requirements to validate a marriage, namely a couple must obey the provisions and requirements of their religion. No marriage is validly held if it is not in line with the law of religion of the respective couple. A marriage shall be solemnized pursuant to the holy matrimonial ceremony. After the religious ceremony is held, a couple must register their marriage with the local Civil Registry Office (*Kantor Catatan Sipil*) for a non-Moslem couple and Religious Affairs Office (*Kantor Urusan Agama*) for a Moslem couple. Registration of a marriage is a must pursuant to the Civil Administration Law, as it is considered as an important legal event in the life of a legal subject. A marriage certificate shall be valid evidence of the existence of marriage, not only for the respective couple but also for any third parties. Those provisions reflect that the marriage law of Indonesia adopts the form of civil marriage and religious marriage, simultaneously.

A marriage has three consequences. The first consequence is rights and obligations between a husband and wife which are not similar yet equal between them. The second consequence is rights and obligations between parents and children. The last consequence is marital assets between a husband and wife. In relation to the last consequence, due to a decision of the Constitutional Supreme Court, a couple can enter into a marital agreement before and during a marriage and on any matters insofar as it does not contradict public order and good morals (*kesusilaan baik*).

The author concludes that MA 1974 covers a mixed marriage in Indonesia, comprising international mixed marriage and interfaith mixed marriage. MA 1974 stipulates that an international mixed marriage is a marriage between a couple, who have different nationalities and one of them is Indonesian, solemnized within the territory of Indonesia. In relation to substantive requirements, a couple must follow the requirements of their national law. An Indonesian national must follow the requirements of MA 1974 while a foreign national must follow the law of the state of his/her nationality. In relation to formality, it will be valid if it is solemnized according to MA 1974. These provisions are in line with the principle of Indonesian PIL. The substantive requirements apply the Principle of Nationality according to Art. 16 of AB, while solemnization requirements apply the principle of *lex loci celebrationis.*

MA 1974 covers an interfaith mixed marriage, but it is silent about the solemnization of interfaith mixed marriage. Therefore, Indonesian judges refer to GHR which in the 1989s, was at a standstill based on a decision of the Supreme Court in the case of Andi Vony Gani. The Supreme Court suggested the Indonesian government to issue a regulation on interfaith mixed marriage. Due to this situation, a couple of interfaith mixed marriage try some other ways to have their marriage solemnized. First, they have their marriage solemnized twice, according to the bride's religion and then the groom's religion. Second, one of the couple of interfaith mixed marriage makes himself or herself subject to the law of religion of the counterparty temporarily, only for the sake of marriage registration. Third, the couple of interfaith mixed marriage have their marriage solemnized abroad. Lastly, the couple of interfaith mixed marriage ask a decision from the relevant district court. Each approach has doubtful and legal questions. After sometime, the Civil Administration Law gives a possibility for the registration of interfaith mixed marriage for the reason of human rights. An interfaith mixed marriage may be conducted upon a district court decision. Based on the Civil Administration Law, the latter approach is currently being employed.

MA 1974 stipulates marriages solemnized outside the territory of Indonesia. Such marriages shall be considered valid if they are solemnized according to the law of country where the marriages are held, provided that they do not contradict Indonesian regulations. It shows that MA 1974 applies the PIL principle of *lex loci celebrationis.* Those marriages may be registered with the Indonesian Civil Registry Office, provided that such international mixed marriages do not contradict Indonesian public policy. Marriage registration must be conducted within six months as of their return to Indonesia with the local registration office. Any delay in this registration shall cause a fine as administrative penalty.

According to the Civil Administration Law, a marriage between foreign nationals in Indonesia may be registered in the Indonesian Civil Registry Office, if they wish to do

so. This marriage may be registered if it is solemnized according to MA 1974. These regulations show the application of PIL principle, namely *lex loci celebrationis.*

Indonesia has Bills of PIL that reflect *communis opinion doctorum*, namely the Bill of 1997 and the Academic Draft which is still under discussion. The Bill of 1997 becomes the starting point of the Academic Draft. Both bills provide for the provisions on marriage with foreign elements.

The Bill of 1997 was proposed to replace the old PIL rules of Indonesia contained in Articles 16, 17, 18 of AB long before the independence of RI. These articles respectively concern with personal status, applicable law of goods or *lex rei sitae,* and applicable law of legal form or *lex loci actus.* Those articles are still valid and effective in Indonesia based on Article 1 of the Transitional Provisions of the Indonesian Constitution.

The Bill of 1997 and the Academic Draft were drafted for several reasons. The influence of globalization, particularly regional cooperation within ASEAN, and ease in making contact and relationship with a person or third party outside the territory of Indonesia are some of the main reasons. In addition, they are drafted in order to provide for cross-border activities and legal certainty as well as protection of activities involving foreign elements. On the other hand, PIL rules in Indonesia are spread out and scattered among several laws and regulations enacted afterward, for instance the Investment Law and intellectual property right law. Some principles are reflected in decisions of the Indonesian Supreme Court which have become landmark decisions and provoke further discussions among scholars. Therefore, the aspiration to codify PIL rules in one act is highly relevant and important for Indonesia.

The main principles of Indonesian PIL are laid down in Chapter II of the Bill of 1997. Art. 2 states that: *"Apabila tidak ada ketentuan dalam Undang-undang ini atau dalam peraturan perundang-undangan Indonesia lainnya yang mengatur suatu persoalan hukum perdata internasional, asas-asas umum dari Hukum Perdata Internasional berlaku bagi persoalan tersebut"* Translation: "In the event of provision of this Law or of other Indonesian laws and regulations providing for a private international law issue, the general principles of Private International Law shall be apply to such issue.

The provisions above bridge the gap in order to provide a means to determine the applicable law in any cases whereby no specific PIL rule is available. The Bill of 1997 states that in the event of no available provision in the Bill of 1997, judges must consider other laws and regulations which may provide more specific regulations. If no provision provides the regulation, judges are entitled to interpret the meaning of the general principles of PIL in the cases in question. They are given the authority and have to

consider international conventions concerning the matters in question, as well as legal theories and common opinions of PIL scholars (*communis opinion doctorum*).[1274]

The Bill of 1997 stipulates that in relation to personal status, Indonesia shall employ the Principle of Nationality in determining the applicable law. In short, the law applicable to a person is his/her national law. If the person has more than one nationality, the applicable law shall be considered as the law of state which is most effective and active. If one of those nationalities is Indonesia, the applicable law shall be the Indonesian law. For a person who according to the Indonesian law is a stateless person, the applicable law is the law of country where he/she has his habitual residence. This provision is effective insofar as it has a relation to the status and authority to take any legal actions while, in relation to any other matters, a stateless person is deemed as a foreigner. The legal status and authority of a foreigner who has lived in the territory of Indonesia continuously for ten years are subject to the Indonesian law.[1275]

The application of such principle also employs the doctrine of *renvoi* (referral), namely single *renvoi* or remission to the domestic law as relevant. The Indonesian laws and regulations will apply as the applicable law in the event that a foreign law (which has previously been chosen as the applicable law) re-appoints the Indonesian laws and regulations. However, the Bill of 1997 is silent with regard to transmission to another foreign legal system (*penunjukkan lebih jauh*).

The Bill of 1997 deals with Indonesian public order. It provides that when a foreign law has been chosen as the applicable law and that law contradicts Indonesian public order and moral values, the application of that foreign law can be prevented. Therefore, the Indonesian law shall be the applicable law in the case in question.[1276] It is specifically provided for that a foreign law which should be applied according to the PIL rules of the state will no longer be applied if it contradicts public order and good morals (*kesusilaan baik*). This Bill of 1997 is silent in relation to the meaning or definition of public order and good morals. In other words, there is no explanation of these provisions/terms. However, it is accepted in Indonesian PIL rules that public order must be used as an 'emergency measure' or an *ultimum remidium*. It must only apply to an

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[1274] Elucidation of Art. 2 para. 3 of the Bill of 1997 '*…tentunya dalam hal ini, bagi hakim atau pelaksana hukum lainnya, diberi kekuasaan untuk menafsirkan apa yang sebenarnya yang diartikan dengan asas-asas umum Hukum Perdata Internasional. Dalam melakukan tugasnya pelaksana hukum harus memperhatikan selain daripada teori-teori umum yang diajarkan dalam text book, juga pendapat para penulis, peraturan-peraturan lain di dalam konvensi-konvensi internasional mengenai hal yang bersangkutan, pendirian dari para sarjana hukum yang khusus berspesialisasi dalam bidang Hukum Perdata Internasional, monografi-monografi, yurisprudensi dan pendapat para sarjana terbanyak (communis opinion doctorum).*'

[1275] Chapter II of the Bill of 1997.

[1276] Art. 4 of the Bill of 1997.

unavoidable situation and when the application of a foreign law is manifestly incompatible with RI's fundamental principles.

The Bill of 1997 appoints the Indonesian law as the applicable law (the *lex fori*) to be applied in order to determine the legal category of any PIL cases.[1277] The Bill does not take into consideration the substantial or real connection of facts in the case concerned or the division of substantive and procedural matters as well as the *lex cause* of the classification. Any classification is made based on the principle of the *lex fori*.

In relation to family law matters, the Bill of 1997 provides for the provisions on, among others, marriage, marital assets, divorce, and adoption.

Marriage. The substantive requirements for a marriage are subject to the law of nationality of the prospective couple, provided that the national law of country in which the marriage takes place states otherwise. In relation to marital property and divorce, the Bill of 1997 consistently uses the Principle of Nationality, except for children. In relation to parentage and obligation between parents and children, the law of nationality of the father is the applicable law. In relation to guardianship of minors, the grounds for guardianship, authority, and obligations of guardian to the minors are subject to the national law of the minors concerned. The obligation to provide a living is subject to the law of the state in which the minors concerned have their habitual residence.[1278]

Amendment to the Principle of Nationality was supported by Sudargo Gautama and Zulfa Djoko Basuki, who presented the view and discussion of the Principle of Domicile. At that time, Sudargo Gautama has presented his opinion for Indonesia to shift and adopt the Principle of Domicile, although he would not negate the application of the principle of nationality in the Indonesian system. He proposed that the principle of nationality does not apply to a foreigner who lives in Indonesia for less than two years. After that period of time, the law of Indonesia in which the foreigner has his/her domicile will apply. The period of two years refers to the regulation on immigration period for Indonesian Card Entry Permission at that time. Zulfa Djoko Basuki, one of his apprentices in PIL, had the same opinion. However, she mentioned five years instead of two years.

Switching proposal from those scholars is among others for practical reason. Use of the principle of domicile may minimize the application of foreign law before the courts because its reference will mostly result in the *lex fori*. In fact, the principle of nationality will mostly lead to the application of foreign law. There is also a concern that the

[1277] Art. 7 of the Bill of 1997.

[1278] Chapter V regarding Family.

application of foreign law may lead to a fallacious application due to the lack of legal writings or experts of the law concerned in Indonesia. Legal pluralism in Indonesia, supported by natives of different *Adat* communities, instead of *golongan rakyat*, encourages the use of the principle of domicile. In addition, the application of the principle of domicile will facilitate the process of assimilation. Moreover, Indonesia is geographically surrounded by states which employ the same principle.

Instead of having the principle of domicile to replace the principle of nationality, Indonesia prefers to amend its law from sole nationality to limited dual nationality *(Prinsip Kewarganegaraan Ganda Terbatas).* Law No. 12 of 2006 still employs the Principle of Nationality, with the addition that children from an international mixed marriage are entitled to have the nationality of their father and mother. Therefore, those children may have another nationality in addition to Indonesian nationality. Those children are entitled to have more than one nationality until they reach the age of 18 years old or are married. Thereafter, they have to choose one of the nationalities. Law No. 12 of 2006 is a good combination between the opinion of PIL scholars and application of the principle of nationality to protect children of international mixed marriage.

The author concludes that the Principle of Domicile has influenced and has been applied in particular cases in Indonesia. The Principle of Nationality in Indonesia needs the assistance of other tools to determine the applicable law of a person. With respect to a person with dual or multi-nationality, the tool is the effective and active citizenship, while for a stateless person, the local law of country in which he/she has a domicile is the applicable law. The basic thought of these tools has similarity, namely the closest connection law. In several articles, it is referred to as Habitual Residence.

The Bill of 1997 proposes the principle of *lex re sitae*. It states that the law applicable to goods is the law of country in which the goods are situated or located. In the event that movable goods are in transportation or transit, the applicable law is the law chosen by the parties in the agreement concerned. If the parties do not choose any law, the applicable law is the law of country in which the goods concerned are located. However, if the goods are at sea, the applicable law is the law of country in which a claim is submitted or law of the judge.[1279]

The Bill of 1997 still reflects the principle of *lex loci celebrationis.* It stipulates that unless stipulated otherwise by the PIL law or other laws and regulations, the validity of a legal action is determined by the law of country in which such legal action is taken. In a legal action related to immovable goods, the law of country in which the immovable

[1279] Chapter III of the Bill of 2015.

goods are situated applies to govern the required form of action to the validity of such legal action.[1280]

The author concludes that the Bill of 1997 (also the Academic Draft) still adopts the principles of PIL previously employed in Indonesia pursuant to Article 16, 17 and 18 of AB.

1.2 Marriage laws of the ASEAN Member States

The Association of South East Asian Nations, abbreviated to the "**ASEAN**", was created on August 8, 1967 in Bangkok, with five original Member Countries, i.e. Indonesia, Malaysia, the Philippines, Singapore, and Thailand. Brunei Darussalam joined in 1984, followed by Vietnam in 1995, Lao PDR and Myanmar (Burma) in 1997 and last but not least, Cambodia in 1999.

Initially, the objectives and purposes of ASEAN are stated in the ASEAN Declaration in Bangkok in 1967. It is declared as follows *"(1) To accelerate the economic growth, social progress and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of South-East Asian Nations; (2) To promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries in the region and adherence to the principles of the United Nations Charter; (3) To promote active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields; (4) To provide assistance to each other in the form of training and research facilities in the educational, professional, technical and administrative spheres; (5) To collaborate more effectively for the greater utilization of their agriculture and industries, the expansion of their trade, including the study of the problems of international commodity trade, the improvement of their transportation and communications facilities and the raising of the living standards of their peoples; (6) To promote South-East Asian studies; and (7) To maintain close and beneficial cooperation with existing international and regional organizations with similar aims and purposes, and explore all avenues for even closer cooperation among themselves."*[1281]

Nowadays, ASEAN develops to be more than political cooperation compared to when it was first established. ASEAN intensifies its cooperation in achieving its objectives, namely the ASEAN One Community that has three pillars, APSC, AEC, and ASCC.

[1280] Art. 3 sub-article (j) of the Bill of 2015.

[1281] See "The ASEAN Declaration (Bangkok Declaration) 1967"at: http://asean.org/asean/about-asean/ , last accessed on June 14, 2016.

The steps and measures in each pillar are described in the Roadmap of ASEAN One Community 2025.

The ASEAN One Community gives a background for ASEAN to unify or harmonize its laws. The unification and harmonization of laws, in particular formation of marriage law, are provoked by free movement of labors and workers as well as human rights, especially the right to marry.

ASEAN realizes that in order to achieve the ASEAN One Community, it needs uniform rules and regulations among the ASEAN Member States to provide legal certainty for cross-border transactions and relations. In relation to the above, the role of PIL as the rule that provides for cross-border transactions and relations is, without any doubt, essential. ASEAN is exploring whether or not the unification of laws can be achieved. If it is not the case, to what extent unification can be made and how. Further, ASEAN is exploring to see the harmonization of laws. Similarities and differences between legal systems among the ASEAN Member States are the starting point of the work.

Comparison of laws amongst the ASEAN Member States with regard to betrothal as well as marriage requirements and solemnization shows similarities and differences. Those states have similarities in the requirements for consent of a couple to enter into a marriage, approval of parents or guardians of a couple as well as requirements for a heterosexual marriage. Differences are shown in the requirement of the principle of monogamy, marriage prohibition and minimum age for a marriage.

Definition of marriage. Each ASEAN Member State has its own way to describe the definition of marriage. The definition has the meaning or purpose of marriage in its laws and regulations. Indonesia, Malaysia, the Philippines, and Vietnam at least mention the definition of marriage clearly, directly and explicitly in one of their laws and regulations. Some ASEAN Member States mention the important elements, purposes of marriage or provisions which are close to the definition of marriage, for instance, Lao PDR, Myanmar, Singapore, and Thailand. The remaining states, namely Brunei Darussalam and Cambodia, state none in their laws and regulations.

Having considered the definition and or purposes of marriage of the ASEAN Member States, there are similarities. The main idea of marriage is stated as consent of a man and woman to enter into a marriage. Consent to enter into a marriage constitutes one of the conditions to start or establish a marriage. This consent must be free from duress, suppression, fraud and intimidation. This consent initiates an exclusive relationship between a man and woman who both agree or give consent to live together and cohabit as husband and wife. Therefore, no other party is allowed to exist between them. This reflects the principle of monogamy of marriage. The exclusive relationship between a man and woman prevents polygamy and a polygamous marriage is forbidden. However,

in some countries, such as Brunei Darussalam, Indonesia, and Malaysia, a polygamous marriage is allowed with certain conditions. The second marriage shall only be solemnized if a man has a prior decision from a local district court which will only be issued with certain conditions.

Another similarity is the purpose of marriage. A couple to a marriage agree to build a happy family or household together. This purpose instigates obligations between a husband and wife to love and support each other as long as they are married, regardless whether or not laws and regulations have any religious values. This purpose also entails the minimum age to enter into a marriage as they have to be relatively mature to be together, not only for the sake of having descendants or children. The marriage law of Indonesia and Vietnam directly describes that the exclusive relationship is not only the establishment but also the relation of the spouse concerned when they live and cohabit together after they are married or enter into their marriage. It also highlights the period of marriage, which is expected to be a lifetime.

Consent of parties to a marriage. Each ASEAN Member State requires that a couple give their consent to enter into a marriage, free from any fraud, suppression or intimidation or any kind of such action.

In the culture of ASEAN Member States, it is common that a marriage is arranged by parents when the couple are very young. Although it is an arranged or planned marriage, in the end, the couple concerned must give their consent to enter into the marriage. The marriage will not happen if consent from each of the couple is not given. Consent of a bride can be a nod or even a silence, as long as no gesture of the bride indicates a refusal of the proposal. This nod or silence is considered common as women in ASEAN countries are more passive and tend not to directly express their feelings. In this regard, registration officers are entitled to procrastinate the marriage or even forbid marriage solemnization if they are not satisfied or confident with the consent of the couple to enter into the marriage, as they are required to confirm the existence of this consent. If the officers are in doubt or are not satisfied with the agreement of the couple-to-be to enter into the marriage, they are entitled to suspend or postpone solemnization of the marriage.

Absence of the consent can cause the annulation of marriage from the date of the marriage concerned. Any exception may only be made if such party with full awareness of the fact constituting a fraud, intimidation or undue influence after it disappears still freely cohabits with his/her counterpart as a husband and wife.

Parents' approval. A couple are obligated to obtain their parents' approval to enter into a marriage, if they are under a certain age, except in Vietnam. Usually, a bride or groom under the age of 20 or 21 years old is obligated to do so. Parents' approval may be

replaced by approval of their guardian or *wali* as a party holding parents' authority. If the approval is not given by the parents for any reasonable reason, the couple may request the approval of a judge which will be considered the same as parents' approval.

In countries that have immense influence of Islam, approval of the parents' bride is required without any relation to minimum age. Parents' approval in Singapore is considered as formality requirements, instead of capacity to marry.

Prohibition. Prohibition also exists in each ASEAN Member State. A couple who have a very close blood relationship or affinity, either descendant or ascendant, are prohibited from marrying. This prohibition has also covered adoptive relation or family relation because of marriage.

Indonesia, Malaysia, and Brunei stipulate that a family of *persusuan* is prohibited from marrying each other. This prohibition exists in the three states, which have prominent Moslem influence. Generally, a family of *persusuan* is a family tie between babies or children breastfed by the same woman who is not their biological mother. The Islamic Family Law of Brunei specifies the definition of family of *persusuan* as a child below 2 years old according to the Islamic calendar (*qamariyah*), who is breastfed on at least 5 occasions by a woman who is not his or her biological mother.[1282] Indonesia and Malaysia have no particular definition of this family tie, but it is understood as the same although there is no stipulation on the number of occasions of the breastfeeding.

Heterosexual couple. This requirement is maintained by all ASEAN Member States. A couple must be between a man and woman. A same-sex marriage is prohibited, including domestic partnership or civil union.

With respect to requirement, only Singapore provides for a deeper provision in determining who is a "woman" or "man". The sexual identity of a person is recognized from the legal identity which is issued based on the prevailing regulations. A woman includes a person who has undergone a reconstruction surgery to become a woman. Vice versa, a man also includes a person who has undergone a reconstruction surgery to become a man. The latest condition shall be considered as the latest condition of the person concerned which is noted in his or her latest legal identity card. A person must marry the opposite sex.

A same-sex marriage is forbidden, particularly in countries which strictly use the religious principles such as Indonesia, Malaysia, the Philippines, and Brunei. On the other hand, Myanmar, Thailand, and Vietnam are countries which are known friendly

[1282] See Art. 2 regarding Interpretation of the Islamic Family Law of Brunei. *"*sesusuan *means where a child, below the age of 2 years according to the Islamic calendar (*qamariyah*), is satisfied by breast feeding on at least 5 occasions by a woman that is not his natural mother;"*

to a same-sex marriage. Thailand and Vietnam forbid or do not recognize a same-sex marriage in their legal system, including domestic partnership or civil union. However, their societies tolerate a couple who do so. In Thailand, the bill of same-sex marriage is under discussion although it still yields no result. The same situation occurs in Vietnam. Singaporean scholars mention that Singapore needs to see the reaction of the society as to whether or not they can accept a same-sex marriage as the new model of family.[1283]

Monogamy Principle. This requirement exists in each ASEAN Member State. In Cambodia, Lao PDR, Myanmar, the Philippines, Thailand, and Vietnam, this requirement is absolute. In Indonesia, Malaysia, and Brunei Darussalam, a monogamous marriage is prioritized, but in certain cases and grounds, a husband may marry another woman or perform a polygamous marriage. The religious background of the countries influences this requirement. There are two main views of this requirement, namely absolute monogamous marriage and limited polygamous marriage.

In countries that have a strong influence of Christianity, Catholicism or Buddhism, namely Cambodia, Lao PDR, Myanmar, the Philippines, Thailand, and Vietnam, a marriage must be a monogamous marriage. In the Philippines, this requirement is absolute and divorce is prohibited.

In Cambodia, Lao PDR, Myanmar, Thailand and Vietnam, monogamy constitutes one of the requirements for marriage. Divorce and re-marriage are possible and allowed, but a monogamous marriage is still a must. Therefore, a person must be legally single when he or she enters into a marriage. Re-marriage is allowed, provided that a person has legal evidence of his or her divorce. If he or she is in the process of divorce, he or she must wait until all processes is legally completed.

For a woman, after divorce, she must wait for a certain period to be able to re-marry. This period is acceptable to ascertain that she is not pregnant or bear a baby from her previous husband in order to avoid any confusion of descendant and to protect paternity right. In Cambodia, this requirement can be waived if a woman is able to present a statement stating that she is not pregnant from a competent professional, for instance, a medical doctor.

A limited polygamous marriage may be found in Brunei, Indonesia, and Malaysia. A monogamous marriage is prioritized in a marriage, but in a certain case approved by a judge, a husband may enter into his second marriage or more with another woman.

In Indonesia, a husband is allowed to marry again if his wife is unable to bear any child or is sick. However, he must have a prior approval from a judge who will ask the consent

[1283] Leong Wai Kum, *Op.Cit.,* pp. 36-38.

of his existing wife or wives as to whether or not she or they agree(s) to be a co-wife. In addition, the husband must also prove to the judge that he is able to feed both of his wives and will treat them fairly and justly.

Minimum Age. All ASEAN Member States have the requirement of minimum age. The minimum age varies from 15-21 years old. Having reviewed the minimum age, it can be concluded that a couple must at least attain their maturity when entering into a marriage. Physically, a person reaches puberty. Mentally, a person is mature enough to distinguish good from bad. The background of the requirement is related to the purpose and objective of marriage itself.

Countries most of the residents of which embrace Buddhism or Hinduism have a higher minimum age than the other. It is understandable because in their understanding, a woman after her first menstruation still needs education and emotional preparation before entering into a marriage.

Solemnization or registration of marriage. The ASEAN Member States stipulate that a marriage should or must be registered with a civil registration office or the appointed registration office. It shows that registration is an important element of marriage. Several ASEAN Member States consider that registration is an important element as it is the milestone of marriage legality.

States such as Cambodia, Lao PDR, Thailand and Vietnam clearly state that a marriage must be registered. Therefore, an unregistered marriage is considered as void or it is stated that a marriage is valid as of the date of registration. All of that states consider a marriage as a civil relationship between a husband and wife. Although there is a religious or traditional ceremony involved in the solemnization of marriage, it will not influence or raise any legal consequences between the parties to the marriage in the state's perspective. Such ceremony does not make any impact on the legality of the marriage concerned.

Brunei Darussalam, Indonesia, Malaysia, the Philippines, and Singapore stipulate that a marriage is valid if it is solemnized according to its particular request. In case of Brunei Darussalam, Indonesia, Malaysia, the Philippines and Singapore, a marriage has to be solemnized by an authorized officer or *juru nikah,* have a valid marriage license and be held in front of two credible witnesses. In Indonesia, the solemnization of marriage is conducted according to the religion of the couple concerned. After the solemnization, a marriage shall be followed by registration with the appointed registration office. Myanmar acknowledges a marriage by registration and also by reputation. The essence of marriage is consent of both parties to enter into a marriage.

Those countries state that registration is a must, but apparently registration is not a requirement for validity of marriage. At least, it is stated that the absence of registration

of a marriage shall not be the only reason to declare that a marriage is void, illegal or invalid.

Those states acknowledge that a marriage is more than a civil relationship between a husband and wife. Brunei Darussalam, Indonesia, Malaysia, and the Philippines acknowledge religious values in marriage, while Myanmar, Singapore and (also) Indonesia acknowledge a marriage based on the customary law.

In relation to mixed marriage, the ASEAN Member States also have similarities and differences in determining the applicable law of substantive requirements. However, in relation to marriage solemnization, they all adopt the same principle – *lex loci celebrationis.*

Cambodia, the Philippines, Thailand, and Vietnam apply the Principle of Nationality to determine the applicable law of marriage capacity. However, not all provisions are similar or identical as there are some exceptions to the provisions. Each of the four ASEAN Member States has its own way in exercising the principle of nationality. There are (i) pure Principle of Nationality, for instance, the Philippines and Indonesia; (ii) Principle of Nationality with additional and particular requirements, for instance, Cambodia; (iii) Principle of Nationality with the addition of the national law when a marriage is in contact with the national law, for instance, Vietnam; (iv) Principle of Nationality with the assistance of the Principle of Domicile or Residence, for instance, Thailand and Vietnam.

The principle of Nationality with certain additions is adopted by Cambodia. Cambodia is a state which puts additional requirements to marriage capacity. A foreign man must be under 50 years old and earns money at least $2,500 per month. The requirements do not apply vice versa to a foreign woman or there is no additional requirement for a foreign woman. The background of these additional requirements is to protect Cambodian women.[1284] The purposes are reasonable, but there are some comments or objections to the same, namely that there is no gender equality as the same stipulation does not apply to Cambodian women.

Vietnam has a slightly different requirement. If a foreigner holds his or her marriage in Vietnam or at a competent Vietnamese agency, the foreign citizen shall also comply with the provisions of the Vietnamese Marriage Law of 2014 on marriage conditions. Therefore, for the foreigner, there are two applicable laws namely the law of his/her nation and Vietnamese law.

[1284] Please see discussion in sub-chapter 2.2.1 of this Chapter.

Stateless Persons. Cambodia is silent about stateless persons. However, the Philippines stipulates that stateless persons and refugees must provide an affidavit indicating marriage capacity. Meanwhile, Thailand stipulates that stateless persons shall be governed by the law of country in which they have their residence. Vietnam applies the Vietnamese Marriage Law of 2014. This provision also applies to a foreign couple who permanently reside in Vietnam and solemnize their marriage at a competent Vietnamese agency, namely that they must comply with the Vietnamese Marriage Law on marriage conditions.

Dual or Multiple Nationalities. Cambodia and the Philippines are silent about dual or multiple nationalities. Thailand states that if a person has two or more nationalities, the state in which the person has his/her domicile shall govern. The alternative is the state in which the person has his/her domicile when a legal action is taken or in which he/she has his/her residence.

Principle of Domicile. Brunei Darussalam, Lao PDR, Malaysia, and Singapore apply the Principle of Domicile to determine the applicable law of marriage capacity. However, not all of the provisions are similar or identical. There are some exceptions to the provisions.

Brunei Darussalam and Malaysia stipulate about domicile. Based on the stipulation, there are two types of domicile. In Brunei Darussalam, it is known as "*bermastautin*" and "*bermukim*". In Malaysia, it is known as domicile and residence. "*Bermastautin*" is the same as domicile and "*bermukim*" is the same as residence. Singapore has a slightly different stipulation. It states that marriage capacity is subject to requirements of the law with which parties to a marriage are most closely connected, for instance, their domicile or law of country of the intended domicile of the parties after the marriage. The main principle is the closest connection. In addition, there is dual-domicile, whereby a person possesses the capacity to marry as prescribed by his/her domicile at the point in time just before marriage solemnization or a newer option is the intended matrimonial home rule.

Renvoi. The author cannot find any provision on *renvoi* in the laws of Brunei Darussalam, Malaysia, Singapore, Myanmar,[1285] Cambodia, and Lao PDR.

The Philippines Family Code has no reference of *renvoi*. However, in a decision of the Supreme Court of the Philippines in 1963, the judge settled a case by exercising *renvoi*. The same situation occurs in Indonesia. Thailand and Vietnam are the ASEAN Member

[1285] Robert Merkin, Johanna Hjalmarsson, *Singapore Arbitration Legislation: Annotated,* 2nd Ed., (Oxon and New York: Informa Law From Routledge, 2016), p. 219. Adrian Briggs, *Private International Law in Myanmar*, (Oxford: University of Oxford, 2015), p. 79.

States which employ *renvoi* and mention it in their regulations. Thailand mentions in Art. 4 of the Thailand Conflict of Laws,[1286] while Vietnam mentions it in Art. 122 (2), (3) of the Vietnamese Marriage Law of 2014.[1287]

Public policy and mandatory rules. Each Member State has its own limitation to recognize a marriage which has foreign elements, whether one of the couples is a foreigner or marriage solemnized abroad.

Brunei Darussalam stipulates that the validity of marriage which takes place outside its territory shall not be valid or invalid merely by reason of its registration or non-registration. An officer of Brunei Darussalam shall register a marriage if he/she is satisfied with the evidence of cohabitation of the couple concerned. In this matter, Brunei Darussalam does not mention any public policy as its limitation in the marriage law, but it values the marriage itself according to its regulations.

Lao PDR stipulates that the requirements of minimum age and monogamy principle are applied to a foreigner who will marry a Lao PDR national. This application supersedes the national law of such person if allowed.[1288] He or she must meet the requirements stipulated in the Lao PDR's Marriage Law. Almost similarly, Myanmar stipulates the monogamy principle which is applicable to all marriages although maybe the law of religion the couple allows a polygamous marriage. The Philippines states that a foreigner must meet the substantive requirements of Art. 35-38 of the Philippines Family Code.

Malaysia recognizes that a marriage is valid if it is solemnized according to the local law of country in which the marriage takes place. The registration office will adjudicate evidence as to whether or not the marriage is validly solemnized abroad before he/she registers the marriage concerned. Singapore also limits the registration of marriage which is solemnized abroad. It states that registrars in Singapore are empowered by the Women's Charter to register all marriages; if they are satisfied that the marriages concerned are not void under the Women's Charter. In other words, the marriages must fulfill the requirements of the Women's Charter.

[1286] "When a foreign law is to be applied and, under such foreign law, Siam law is applicable, then the law of Siam shall be applied, yet without the legal principles of Conflict of Laws."

[1287] "(2) In case this Law and other legal documents of Vietnam refer to the application of foreign law, such foreign law shall apply, provided such application does not contravene the fundamental principles laid down in Article 2 of this Law. In case a foreign law refers back to the Vietnamese law, Vietnam's marriage and family aw shall apply. (3) In case a treaty to which the Socialist Republic of Vietnam is a contracting party refers to the application of a foreign law, such foreign law shall apply."

[1288] Art. 47 of the Lao PDR's Marriage Law.

Thailand mentions that a marriage outside its territory shall be valid if it is solemnized and is in accordance with the Thailand's law. If a couple desires to have their marriage registered according to Thailand's law, the registration shall be effected by a Thailand Diplomatic or Consular Office. In this matter, Thailand adds the principle of *locus rigit actum* to its marriage law.

Vietnam states that it recognizes a marriage according to a foreign law as long as it does not contravene its law. It mentions that the principle of monogamy, voluntary to enter into a marriage, and equality of legal protection to marriage, either between non-believers, believers, Vietnamese nationals or foreigners. It requires that at least those three principles, namely the principle of monogamy, voluntary and equal protection, are applied.

The limitation of each ASEAN Member State is different from each other. In general, it mentions that a marriage solemnized abroad shall be registered if it does not contradict *lex fori.* However, there are some ASEAN Member States stating some principles which must be followed and override the law which should initially be applied. Lao PDR, Myanmar, the Philippines, and Vietnam mention their limitations, namely that their requirements cannot be violated.

The principles above, which particularly supersede the initial applicable law, constitute a legitimate example that overriding "mandatory rules" and "public policy" vary from one legal system to another. The reason is multifold between cultural, historical, political, etc. Classification to specify whether or not the requirements include "mandatory rules" or "public policy" have to be perceived in specific legal contexts.

Nevertheless, this does not mean that no common feature of "mandatory rules" and "public policy" can be found across legal systems. "Mandatory rules" are defined as specific rules designed to protect specific and overriding interests which demand immediate application to whatever cases that fall within their scope. "Mandatory rules" are always connected with the public and economical aspects. "Public policy" is a device which aims to safeguard the fundamental values and principles of its forum, and which has the effect of excluding the application of a foreign law that will otherwise be applied.

The aim is to protect the crucial and fundamental philosophy of marriage. Although, some opinions may say that in terms of the scope of application, both devices may sometimes overlap (frequency and rarity of such situation vary from one country to another). There are cases which fall within the scope of mandatory rules but do not trigger the device of public policy. It is a case whereby specific legal interests are considered to be so fundamental to be part of public policy, instead of given mandatory rules. In addition, in this case, public policy is invoked to exclude the (foreign) law in

order to apply the law of the forum, whereby no mandatory rule is in place to demand application.

Lex loci celebrationis. The ASEAN Member States stipulate that a marriage must take place according to the formal procedure pursuant to the law of state where the marriage takes place. In this regard, the principle is adopted by each ASEAN Member State with its own limitation which is different from one another. The limitation differentiates the application of such principles.

2 Synthesis: Recommendations to Indonesian and ASEAN Legislatures

Based on the preceding discussion of marriage law of the ASEAN Member States, the author has recommendations comprising two parts, recommendations for the marriage law of Indonesia and ASEAN in order to achieve the ASEAN One Community.

2.1 Indonesia

Based on the discussion and analysis of the Indonesian marriage law, the author would like to provide some recommendations:

2.1.1 MA 1974

1. Indonesia needs to provide for regulations on interfaith mixed marriage.

In a legally pluralistic society like Indonesia, the existence of interfaith mixed marriage is reasonable and cannot be avoided. From the proceeding discussion of interfaith mixed marriage before the Constitutional Supreme Court, it appears that some religions in Indonesia do not totally forbid an interfaith mixed marriage. Although, most religious leaders advise to avoid the same, as such marriage is not ideal, the possibility exists and is real in the society. With respect to the advice, a couple of interfaith mixed marriage have the freedom to choose, whether they want to avoid it as suggested by their religious leaders or to follow their own heart. At this point, religious leaders or the state cannot interfere. In addition, the state should provide protection to children of such couple. If the state does not provide any legal procedure, their children become illegitimate children which influence the right of the children. Therefore, the procedure for solemnization of this kind of marriages should be provided, just like any other marriages. Equality between religions, as reflected in Art. 2 of GHR, can be the starting point.

2. Indonesia needs to elaborate its opinion on DSD persons, in particular, their right to marry.

There are persons with Disorder of Sexual Development (DSD) in Indonesia. They cannot be identified as women or men. A person with DSD is a person who has

ambiguous genital organ or sex ambiguity. The person has symptoms, anatomy and or physiologic doubt as to whether he/she is a man or woman.

This phenomenon exists in the Indonesian society, for instance, *Bisu* in Bugis (one of the well-known ethnic groups in Indonesia). For them, Indonesia needs to provide rules and regulations as to whether they can have a medical treatment or reconstruction surgery upon their genital organ, followed by revision to their identity and further, their right to marry their opposite sex as relevant.

3. With respect to the development of high technology in the medical field, Indonesia can provide some regulations.

Indonesia can shorten the waiting period or *iddah* period of a widow by providing an option that the *iddah* period shall not prevail upon an official statement from a professional doctor stating that she is not pregnant. This suggestion also applies to a surrogate mother.

4. Indonesia should re-think about the stipulation of the minimum age of brides.

The author suggests that legislators increase the minimum age of brides in Indonesia. First, for health reasons when bearing a child, a mother must be in a good physical condition which will be impossible if she herself is still a child. The second reason is education. Indonesia has a compulsory education program for 12 years which usually starts when children are at the age of 6 or 7 years old. Education will equip and give a chance for them to grow and become adults before entering into their marriage and live their life.

2.1.2 International mixed marriage and PIL in Indonesia

1. Indonesia should provide regulations on mixed marriage in more details.

Indonesia should provide the applicable law for an international mixed marriage in more details than a mere legal consequence of the nationality of children. The author supports and appreciates the provisions of international mixed marriage in the Bill of 1997 (Chapter 3.6.4) which reflect the current principles of PIL. Until now, the proposed provisions are still relevant, for instance, provisions on pre-marital agreement, marital domicile, etc. Therefore, it is necessary for Indonesia to include those provisions in the Bill of Indonesian PIL.

2. Indonesia should provide provisions on the recognition of marriage solemnized or held abroad.

MA 1974 states that Indonesia acknowledges a marriage held abroad if it is solemnized according to the local law, provided that it does not contradict the provisions of MA 1974. For legal certainty, the author advises that Indonesian legislators can provide a

ground for refusal of such recognition. The author suggests that Indonesian legislators can adopt the limitation as stated in the Hague Marriage Convention and any other reasons acceptable to Indonesian cultures and values.

The majority of marriages solemnized abroad are in fact interfaith mixed marriages. If Indonesia does not want to recognize those marriages, Indonesia does not facilitate the exercise of right to marry of its citizens. These marriages should no longer be ignored and must be recognized by the State. The state should not be silent. The state should provide a procedure for interfaith mixed marriage as Indonesia has a pluralistic society. The author appreciates the opinion that interfaith mixed marriages are forbidden. Therefore, it is the task of religious leaders to educate the congregation to be faithful to what they believe according to their free will before they become a bride or groom, instead of asking the state to interfere by bearing in mind that religion and the state are two different institutions.

3. Indonesia should participate in international conventions, even though as an observer.

Indonesia needs to observe and participate in international conventions for the sake of PIL development. Therefore, Indonesia can anticipate its PIL rules and regulations according to the current international situation.

4. Indonesia needs to provide for its PIL regulations in an act, namely codification.

The Indonesian PIL provisions are scattered in its prevailing rules and regulations. Indonesia needs to have one codified act. At this moment, Indonesia has the Bill of 1997 and Academic Draft which is under discussion. The Bill of 1997 can be a starting point to re-draft or re-arrange PIL stipulations and articles.

It is advisable that the draft includes the developing trends on the international marriages, the stipulations of PIL rules on marriage law and international family law. The transition clauses and also the stipulation of enforceability when this act meets the PIL Conventions whereby Indonesian is one of the parties. This act will be a bridge to fill the existing gaps between the current MA 1974 and the existing needs.

5. Flexibility of the Principle of Nationality: Active Nationality, Domicile or Habitual Residence?

The author supports the adoption of the Principle of Nationality in Indonesia as the primary principle in determining the applicable law of personal status. This principle provides legal certainty. In relation to persons with dual or multiple nationalities, the author supports the initial opinion that the applicable law should be according to the effective nationality. However, it is also advisable to consider the principle of habitual residence in this situation for three reasons. First, the principle of Habitual Residence

reflects the basic thought of PIL stating that the applicable law shall be the law with the closest connection. Second, the principle of Habitual Residence can assist in cases of persons with dual and multi nationalities. In addition, the same principle can also be applied to cases of stateless persons, permanent residence or temporary residence. This principle also provides flexibility, which is also needed in Indonesia, for instance, to determine the law applicable to a foreigner who lives in Indonesia. In particular, foreigners who hold a strata title in Indonesia must live in Indonesia for more than a certain number of years (Chapter 3.6.3). It is also advisable that Indonesia can provide provisions on refugees because eventually, Indonesia becomes a temporary shelter for refugees. The application shall also certainly consider the main principle in particular cases, for instance best interest of children.

The prevailing rules and regulations in Indonesia use several terms in describing domicile, among others *domisili* (domicile), *tempat tinggal* (residence), *tempat kediaman* (place of residence), *berkedudukan* (location), *kediaman sehari-hari* (habitual residence). Due to this variety, the author suggests consistency in using the terms after defining them one by one in the prevailing laws and regulations.

6. *Renvoi* in Indonesian PIL.

The author recommends that the Bill of Indonesia PIL also provides for the application of *renvoi* as already occurred in Indonesia. The stipulation can limit or exclude the ASEAN Member States provided that the ASEAN Member States give consent to apply Habitual Residence.

Renvoi can occur in the event that the counterparty of Indonesia states that the applicable law shall be the law of domicile or habitual residence. Remission or transmission can also be the alternative. To prevent such cases, it is advisable that Indonesia still stipulates *renvoi* in its Bill of PIL.

7. Public policy and mandatory rules.

It is advisable that the Bill of Indonesian PIL regulates public policy and mandatory rules. It is acceptable that the Bill of Indonesian PIL does not define public policy because its interpretation shall be in line with the time and context. At least, it can state that public policy shall be an “emergency measure” or *ultimum remidium* in the event that the foreign law is manifestly incompatible with Indonesian’s fundamental principles. The situation is similar to mandatory rules which need more elaboration in Indonesia.

2.2 ASEAN

In relation to the ASEAN One Community, in particular, the marriage law, some recommendations that can be offered to ASEAN legislators are as follows:

1. ASEAN needs to determine the methodology of the applicable law or choice of law.

Such methodology should ideally be discussed independently from any concrete legislative projects in order to have a general debate on the issue. The independent debate should be without any pressure from each participant who has to serve his/her national interests in a particular field of the family law. This debate should expressly and directly address "foreign law problems". In establishing a proper ASEAN methodology of the international family law, balance of particular importance in this respect is needed, first, between unity and diversity and, second, between flexibility and certainty.

The latter balance is important as according to history, the ASEAN Member States adopt the common law and civil law systems. The combination of strict rules and flexible possibility is ideal to find an applicable law in favor of the closest connection. Such methodology should attempt to attain an appropriate balance between legal certainty and flexibility.

2. ASEAN should be transparent.

ASEAN should determine joint objectives, transparency of the reasons behind the proposal. ASEAN indeed has a roadmap in general, but particularly for the marriage law, ASEAN should address common objectives. Those objectives become the starting point to enable the ASEAN Member States to work together in harmony.

The family law is a sensitive area of law. Therefore, a clear and reliable legal reasoning behind the unification and or harmonization is required. The absence of transparency of legal reasoning increases the reluctance of the ASEAN Member States to unify and harmonize the international family law and will, in turn, harm the objectives of ASEAN.

When ASEAN legal instruments containing PIL rules are established, ASEAN needs to maintain their transparency. This can be attained by the development and or more elaboration of elucidation or explanatory memorandum or guidance that accompany the instruments concerned.

3. A coherent approach is required.

A PIL system in ASEAN should display the following features: coherence, logical structure, absence of contradiction, completeness, clarity, and ease of use.[1289]

4. The legal instruments of ASEAN should be clearer and more certain.

ASEAN has various legal instruments, for instance, roadmap, declaration etc. Every legal instrument has legal meaning and legal binding enforcement. In this situation, ASEAN should make itself clear about its tools, so each delegation can make a choice according to the authority given by their state. To support the establishment of the ASEAN One Community or greater integration in ASEAN, tools are required.

In relation to the international mixed marriage and the recognition of a marriage, it is advisable that the ASEAN Member States enter into a convention on celebration and recognition of marriage validity. A convention can be an ideal solution to resolve the effect of complications due to cultural diversity among ASEAN Member States.

5. The ASEAN Way as the decision-making rules need to be sharpened.

ASEAN is well-known for honoring consensus in achieving its resolutions. It is good as each ASEAN Member State is appreciated so that it is willing and agrees to the relevant resolutions. However, this ASEAN Way encounters the acceleration of ASEAN in making its solutions in order to establish the ASEAN One Community. Due to this situation, ASEAN should find another way out or another alternative. For instance, if consensus is unachievable, alternative resolutions can be based on nine ASEAN Member State or ASEAN minus one with a note on the objection of the state concerned.

6. ASEAN should elaborate its own culture to enrich its PIL and propose a model law.

ASEAN has its own ways in managing its regional cooperation. Each ASEAN Member State, in addition to the adoption of its legal system due to its history, has its own culture and or customary law. This category needs to be elaborated by ASEAN as one of the alternatives of legal resources for ASEAN. This can be a favor for ASEAN, as it will be easy if ASEAN applies something that is already rooted in its culture. Acceptance will be less difficult.

In finding these principles, ASEAN needs to have a think tank working independently. Officers should be free from the obligation to serve their national interest. This think

[1289] Fiorini, 2008

tank should resolve a model law that settles the relation and or transaction in the field of marriage law and produces a model law. As a model law, no binding obligation shall burden the ASEAN Member States. As the roots are its own culture, ASEAN shall be more open to make adaptation and adjustment.

7. ASEAN should maintain the "*lex loci celebrationis*"

ASEAN needs to maintain the application of the principle of the *lex loci celebrationis* which is known in all marriage laws of the ASEAN Member States. The author would like to suggest ASEAN to agree the employment of habitual residence as the closest connection to a person with his/her surroundings.

Bibliography

Books, Articles, Journals

Abbot, Kenneth W. and Duncan Snidal. *Hard and Soft Law in International Governance,* International Organization, Vol.54 No.3, Legalization and World Politics (Summer, 2000), pp.421-456.

Abdurrasyid, Priyatna. *Arbitrase & Alternatif Penyelesaian Sengketa* (translation: Arbitration and Alternative Dispute Settlement). Jakarta, PT Fikahati Aneska dan Badan Arbitrase Nasional Indonesia, 2002.

Adji, Sution Usman. *Kawin Lari dan Kawin antar Agama* (translation: Run-away Bride and Inter-religion Marriage). Yogyakarta, Liberty, 1989.

Adolf, Huala. *Hukum Arbitrase Komersial Internasional* (translation: International Commercial Arbitration Law). Jakarta, Radjagrafindo, 1994.

Agustina, Rosa. *Beberapa Catatan Tentang Hukum Perkawinan di Indonesia* (translation: Notes of Marriage Law in Indonesia) in W.D. Kolkman, Rosa Agustina, Leon C.A. Verstappen, Rafael Edy Bosko, *Personal Law, Family Law and Heritance Law in the Netherland and Indonesia.* Jakarta, Pustaka Larasan, 2012.

Allagan, Tiurma M.P. *Are You (Wo)Man Enough to Get Married?.* Indonesian Legal Review, Vol.6 No.3, 2016.

Allagan, Tiurma M.P. *Indonesian Private International Law: The Development After More Than A Century.* IJIL (Indonesian Journal of International Law), 2017, Vol.14 No.3. Jakarta, Lembaga Pengkajian Hukum Internasional, 2017.

Allagan, Tiurma M.P. *Intercountry Adoption in Indonesia*, IJIL (Indonesian Journal of International Law), 2018, Vol.15 No.2. Jakarta, Lembaga Pengkajian Hukum Internasional, 2017.

Allagan, Tiurma M.P. *The Bill on Indonesian Private International Law,* NIPR *(Nederlands Internationaal Privaatrecht)* Vol.33/3, 2015.

ASEAN. *A Blueprint for Growth, ASEAN Economic Community 2015: Progress and Key Achievements*. Jakarta, Asean Secretariat, 2015.

ASEAN. *Kuala Lumpur Declaration on ASEAN 2025: Forging Ahead Together*, Jakarta, ASEAN Secretariat, 2015.

ASEAN. *Master Plan on ASEAN Connectivity 2025*. Jakarta, The ASEAN Secretariat, 2015.

ASEAN. *Terms of Reference of ASEAN Commission on the Promotion and Protection of the Rights of Women and Children.* Jakarta, ASEAN Secretariat, 2010.

Atkin, Bill (Ed.). The International Survey of Family Law 2016 Edition. Bristol, Jordan Puiblishing, Family Law, Jordan Publishing, 2016.

Baarsma, Nynke A. *The Europeanisation of International Family Law, From Dutch European Law: An Analysis on the Basis of the Choice of Law on Divorce and on the Termination of Registered Partnerships.* Dissertation. Groningen, Ulrik Huber Institute for Private International Law, 2010.

Bakry, K.H. Hasbullah. *Kumpulan Lengkap Undang-undang Peraturan Perkawinan di Indonesia* (translation: Complete Compilation of Marriage Regulations in Indonesia). 3rd Ed.. Jakarta, PT Djambatan, 1985.

Basedow, Jürgen and J Basedow. *The Law of Open Societies: Private Ordering and Public Regulation in the Conflict of Laws,* BRILL, 2015, p.81.

Basuki, Zulfa Djoko, Tiurma M.P. Allagan, et.all. *Hukum Perdata Internasional (Buku Materi Pokok/3SKS, Modul 1-9)* (Translation: Private International Law *(Material Book /3SKS, Modul 1-9).* Jakarta, Penerbit Universitas Terbuka, 2014.

Basuki, Zulfa Djoko. *Bunga Rampai Kewarganegaraan, Dalam Persoalan Perkawinan Campuran* (translation: Anthology of Nationality, Issues in the International Mixed Marriage). Jakarta, Badan Penerbit Fakultas Hukum Universitas Indonesia, 2007.

Basuki, Zulfa Djoko. *Dampak Perkawinan Campuran terhadap Pemeliharaan Anak, Tinjauan dari Segi Hukum Perdata Internasional* (translation: The Impact of Mixed Marriage Towards the Child Custody from the Private International Perspective). Dissertation in Faculty of Law of Universitas Indonesia. Jakarta, Yarsif Watampone, 2005.

Basuki, Zulfa Djoko. *Hukum Perkawinan di Indonesia* (translation from author: Marriage Law in Indonesia). Jakarta, Badan Penerbit Fakultas Hukum Universitas Indonesia, 2010.

Beaumont, Paul R. and Peter E McEleavy, *The Hague Convention on International Child Abduction.* Oxford: Oxford University Press, 1999.

Beekma, E.M. Paradijzen van Weleer, Koloniale Literatuur uit Nederland Indië 1600-1950. Amsterdam, Prometheus, 2006.

Boele-Woelki, Katharina, T. Einhorn, D. Girsberger & S. Symeronides (eds.). *Convergence and Divergence in Private International Law – Liber Amirocum Kurt Siehr.* The Netherlands, Eleven International Publishing, 2010.

Boele-Woelki, Katharina. *To be or not to be: Enhanced Cooperation in International Divorce Law within the European Union.* Victoria University of Wellington Law Review, 2008, pp.779-792.

Briggs, Adrian. *Private International Law in Myanmar*. Oxford, University of Oxford, 2015.

Caliwan, Emmanuel. *Family Law in the Philippine An Overview*, at http://www.academia.edu/4102315/Family_law_in_the_Philippines_An_Overview

Calster, Geert van. European Private International Law. 2nd Ed. North America, Hart Publishing, 2016.

Cho, Yee Yee. *Women's Rights under Myanmar Customary Law.* Dagon University Research Journal 2012, Vol.4., p.58.

Coester-Waltjen, Dagmar. *Marriage* in *Encyclopedia of Private International Law*, (ed.) Jürgen Basedow, Giesel Rühl, Franco Ferrari, Pedro De Miguel Asensio, (Cheltenham: Edward Elgar Publishing Limited, 2017).

Cruz, Peter de. *Family Law, Sex and Socety, Comparative Study of Family Law.* London and New York, Routledge, 2010.

Coquia, Jorge R. *A Restatement of Conflict of Law (Private International Law) For Philippines,* Philippine Law Journal, Vol.67 Second Quarter, 1992.

Cuniberti, Gilles. *Conflict of Law, A Comparative Approach Text and Cases,* UK: Edwar Edgar Publishing Limited, 2017.

Darmabrata, Wahyono. *Tinjauan Undang-undang No.1 tahun 1974 tentang Perkawinan beserta Undang-undang dan Peraturan Pelaksanaannya* (translation: Review on Law No.1 of 1974 regarding Marriage and Its Implementation Regulation). Jakarta, Badan Penerbit Fakultas Hukum Universitas Indonesia, 1997.

Darmabrata, Wahyono. *"Empat Cara Penyelundupan Hukum Bagi Pasangan Beda Agama"* http://www.hukumonline.com/berita/baca/hol15655/empat-cara-penyelundupan-hukum-bagi-pasangan-beda-agama, last accessed on 23 March 2015.

Davidson, Paul J. *The ASEAN Way and the role of law in ASEAN Economic Cooperation*, The 2004 Singapore Year Book of International Law and Contributors.

Departemen Agama RI. *Laporan Seminar Tentang Pelaksanaan Undang-undang Perkawinan* (translation: Report of Seminar on the Implemantion of Marriage Law). Jakarta, Departmen Agama RI, 1978/1979.

Dienla, Imelda. *The Development of the Rule of Law in ASEAN: The State and Regional Integration.* Cambrige, UK; New York, Cambrige University Press, 2017.

Dijk, Van. *Pengantar Hukum Adat Indonesia* (translation: Introduction of Indonesian Customary Law), translated into Indonesian Language by A. Soehardi W.V, (Bandung: Hoeve Bandung s'Gravenhage, 1954).

Dimyati, Khudzaifah. *Teorisasi Hukum, Studi Tentang Perkembangan Pemikiran Hukum di Indonesia 1945-1990* (translation: Law Theoryzing, Study on the Development of Legal thingking in Indonesia 1945-1990). Surakarta, Penerbit Muhammadiyah University Press, 2004.

Djubaedah, Neng. *Pencatatan Perkawinan dan Perkawinan Tidak Dicatat Menurut Hukum Tertulis di Indonesia dan Hukum Islam* (translation: Marriage Registration and Un-registered Marriage according to the Law in Writing in Indonesia and Islamic Law). Jakarta, Sinar Grafika, 2010.

Dutta, Anatol. *Domicile, Habitual Residence and Establishment* in *Encyclopedia of Private International Law*, (ed.) Jürgen Basedow, Giesel Rühl, Franco Ferrari, Pedro De Miguel Asensio, (Cheltenham: Edward Elgar Publishing Limited, 2017).

Eoh, Octavianus S. *Perkawinan Antar-Agama Dalam Teori dan Praktik* (translation: Inter-faith Mixed Marriage in Theory and Practices). Jakarta, PT. RajaGrafindo Persada, 1996.

Ferrari, Franco. *Factoring (Uniform Law),* in *Encyclopedia of Private International Law*, (ed.) Jürgen Basedow, Giesel Rühl, Franco Ferrari, Pedro De Miguel Asensio, (Cheltenham: Edward Elgar Publishing Limited, 2017).

Fiorini, Aude. *The Codification of Private International Law in Europe: Could the Community Learn from Experience of Mixed Jurisdictions?* Electric Journal of Comparative Law Vol. 12.1, (May 2008).

Forsyth, C.F. *Private International Law, The Modern Roman-Dutch Law Including the Jurisdiction of the High Court*, 4th Ed.. Lansdowne, Juta & Co. Ltd., 2003.

Gautama, Sudargo and Sri Hanifa Wiknjosastro, *Some Aspect of Indonesian Private International Law,* Malaya Law Review, 1990, p.418-432.

Gautama, Sudargo. *Aneka Hukum Arbitrase (Ke Arah Hukum Arbitrase Indonesia Yang Baru)* (translation: The Arbitration Law (The tendency of the New Indonesian Arbitration Law)). Bandung, Penerbit PT Citra Aditya Bakti, 1996.

Gautama, Sudargo. *Bunga Rampai Hukum Antar Tata Hukum* (translation: Anthology of Conflicts of Laws). Bandung, Penerbit Alumni, 1993.

Gautama, Sudargo. *Hukum Dagang dan Arbitrase Internasional* (translation: International Commercial and Arbitration Law). Bandung, Penerbit PT Citra Adhitya Bakti, 1991.

Gautama, Sudargo. *Hukum Perdata Internasional Indonesia Buku Ketiga Jilid Kedua (Bagian Kedua)* (translation: Indonesian Private International Law, Volume II Part 2, the 3th Book), 3rd Ed.. Bandung, PT Eresco Bandung, 1988.

Gautama, Sudargo. *Hukum Perdata Internasional Indonesia Jilid I Bagian 1 Buku ke-1.* (translation: Indonesian Private International Law, Volume I Part 1, the 1st Book), 7th Ed.. Bandung, Penerbit Alumni, 2008.

Gautama, Sudargo. *Hukum Perdata Internasional Indonesia Jilid II Bagian 1 Buku ke-2.* (translation: Indonesian Private International Law, Volume II Part 1, the 2nd Book), 4th Ed.. Bandung, PT Eresco Bandung, 1986.

Gautama, Sudargo. *Hukum Perdata Internasional Indonesia Jilid III Bagian 2 Buku ke-8.* (translation: Indonesian Private International Law, Volume III Part 2, the 8th Book), 3rd. Ed.. Bandung, Penerbit Alumni, 1998.

Gautama, Sudargo. *Hukum Perdata Internasional Indonesia Jilid II Bagian 4 Buku ke-5.* (translation: Indonesian Private International Law, Volume II Part 4, the 5th Book), 2nd Ed.. Bandung, Penerbit Alumni, 1998.

Gautama, Sudargo. *Hukum Perdata Internasional Indonesia Jilid III Bagian I, Buku ke-7* (translation: Indonesian Private International Law, Volume III Part I, the 7th Book), 3rd revised Ed.. Bandung, Penerbit Alumni, 2010.

Gautama, Sudargo. *Hukum Perdata Internasional Indonesia, Jilid II Bagian III, buku Ke-empat* (translation: Indonesian Private International Law, Volume II Part 3, the 4th Book). Bandung, Penerbit Alumni, 1989.

Gautama, Sudargo. *Hukum Perdata Internasional Indonesia, Jilid II Bagian 5 Buku ke-6* (translation: Indonesian Private International Law, Volume II Part 5, the 6th Book), 3rd revised Ed. Bandung, Penerbit Alumni, 2007.

Gautama, Sudargo. *Indonesia dan Konvensi-konvensi Hukum Perdata Internasional* (translation: Indonesia and Conventions on Private International Law). Bandung, Penerbit Alumni, 1983.

Gautama, Sudargo. *Pengantar Hukum Antar Golongan* (translation: Introduction to Inter-legal Law). Jakarta, PT Ichtiar Baru-Van Hoeve, 1991.

Gautama, Sudargo. *Pengantar Hukum Perdata Internasional Indonesia* (translation: Introduction to Indonesian Private International Law). Bandung, Binacipta, 1987.

Gautama, Sudargo. *Perkembangan Arbitrase Dagang Internasional di Indonesia,* Bandung, PT Eresco Bandung, 1989.

Gautama, Sudargo. *Segi-segi Hukum Internasional pada Nasionalisasi di Indonesia.* Bandung, Penerbit Alumni, 1975.

Gautama, Sudargo. *Segi-segi Hukum Peraturan Perkawinan Campuran (Staatblad 1898 No.158)* (translation from author: Legal Aspects of Mixed Marriage (State Gazette 1898 No.158), 4th Ed., revised edition. Bandung, Penerbit PT Citra Aditya Bakti, 1996.

Gautama, Sudargo. *The Legal Status of Foreigners in Indonesia*. Jakarta, PT Kinta Djakarta 1963.

Gautama, Sudargo. *Hukum Perdata Internasional Hukum Yang Hidup* (translation: Private International Law is a Living Law). Bandung, Penerbit Alumni, 1983.

Haar, Ter. *Beginselen en Stelsel van het Adatrecht.* Jakarta, JB Wolters-Groningen, 1950.

Harahap, M. Yahya. *Kedudukan Janda, Duda dan Anak Angkat dalam Hukum Adat* (translation: Position of Widow, Widower and Foster Child in Adat Law). Bandung, Penerbit PT Citra Aditya Bakti, 1993.

Hardjowahono, Bayu Seto. *Dasar-Dasar Hukum Perdata Internasional Buku Kesatu* (Basic Principles of Private International Law, The 1st Book), 4th revised Ed.. Bandung, Penerbit PT Citra Aditya Bakti, 2006.

Hartono, C.F.G. Sunaryati. *Dari Hukum Antar-Golongan ke Hukum Antar-Adat* (translation: From Interlegal Law to Inter-Customary Law) 5th Ed.. Bandung, Penerbit PT Citra Aditya Bakti, 1989.

Hartono, C.F.G. Sunaryati. *Beberapa Masalah Transnasional dalam Penanaman Modal Asing di Indonesia* (translation: Several Transnational Issues in Foreign Capital in Indonesia). Dissertation. Bandung, Binacipta, 1973.

Hartono, C.F.G. Sunaryati. *Pokok-pokok Hukum Perdata Internasional* (translation: Principles of Private International Laws). Bandung, Binacipta, 1976.

Hazairin. *Tinjauan Mengenai UU Perkawinan Nomor 1 tahun 1974* (translation: Review on Law No.1 of 1974 regarding Marriage). Jakarta, Tintamas, 1975.

Henrico, Radley. *Understanding the Concept of Religion within the Constutional Guarantee of Religious Freedom,* South African Law Journal L.784 (2015), pp.784-803.

Himawan, Charles. *Komentar Keputusan Hakim* in *Jurnal Hukum dan Pembangunan No.1 of IX, January 1979,* pp.71-82.

Huisman, Greddy. Trouwen Met de Handschoen, Een Huwelijk in Nederlands-Indië omstreek 1890. Groningen, 2008.

Hutcheson, Joel, et. al. "*Disorder of Sex Development*", accessed on 4 June 2016. http://emedicine.medscape.com/article/1015520-overview.

Ichtijanto, H. *Perkawinan Campuran Dalam Negara Republik Indonesia, Suatu Studi ke arah Hukum yang Dicita-citakan* (translation: Mixed Marriage within the Republic of Indonesia, A Research Study to a Desired Law). Dissertation. University of Indonesia, Jakarta, 1993.

Ichtijanto, H. *Perkawinan Campuran dalam Negara Republik Indonesia* (translation: Mixed-Marriage in the Republic of Indonesia). Jakarta, Badan Litbang Agama dan Diklat Keagamaan, Departemen Agama Republik Indonesia, 2003.

ISEAS. *MERCOSUR Economic Integration: Lesson for ASEAN,* ASEAN Studies Centre-ISEAS, Report No.5, 2009.

Jafizham, T. *Persintuhan Hukum Indonesia dengan Hukum Perkawinan Islam* (translation: Contiguity of Indonesian Law and Islamic Marriage Law), Dissertation, 2nd Ed.. Jakarta, PT. Mestika, 2006.

Jamnarnwej, Wimolsiri. *Family Law of Thailand,* on *Thailand Law Forum, Law Analysis and Features om Southeast Asia*, available at http://www.thailawforum.com/articles/familywimol.html

Jones, Gavin W. (Ed.). *Muslim-Non-Muslim Marriage, Political and Culture Contestations in Southeast Asia,* Singapore: ISEAS-Yusof Ishak Institute, 2009.

Keur, Dorine Van Der. *Legal and Gender Issues of Marriage and Divorce in Cambodia, Cambodia Law and Policy Journal issued 2 July 2014,* available at

http://cambodialpj.org/wp-content/uploads/2014/07/DCCAM_CLPJ-Issue-2_FINAL.pdf

Koesnoe, Mohammad. *Hukum Adat Sebagai Suatu Model Hukum: Bagian I (Historis)* (translation: Adat Law as a Model Law: Part 1 (History)). Bandung: Mandar Maju, 1992.

Koesnoe, Mohammad. *Perkembangan dari Pemikiran Cara-Cara Penyelesaian Masalah Hukum AntarGolongan di Indonesia* (translation: The Development of the Thought of Problem Solving of the Interlegal Law Cases in Indonesia), Dissertation. Surabaya, FH Universitas Airlangga, 1965.

Kötz, Hein. *The Value of Mixed Legal Systems, Tulane Law Review,* Vol.78, 2003.

Kum, Leong Wai. *Elements of Family Law in Singapore.* 2nd Ed. Singapore, LexisNexis, 2012.

Kusumah, Hilman Hadi. *Hukum Perkawinan Adat dengan Adat Istiadat dan Upacara Adatnya* (Customary Marriage Law with the regulations as well as its Ceremonies). Bandung, Penerbit PT Citra Aditya Bakti, 2003.

Kusumah, Hilman Hadi. *Hukum Perkawinan Indonesia menurut Perundangan, Hukum Adat, Hukum Agama* (translation: Indonesian Marriage Law according to National Regulation, Adat Law, Religion Law). Bandung, Mandar Maju, 1990.

Kusumah, Hilman Hadi. *Pokok-pokok Pengertian Hukum Adat* (translation: Basic Concepts of Adat Law). Bandung, Penerbit Alumni, 1980.

Kyaw, Aye. *Religion and Family Law in Burma,* Southeast Program Fellow Cornell University, available at http://www.siamese-heritage.org/jsspdf/1991/JSS_080_2e_AyeKyaw_ReligionAndFamilyLawInBurma.pdf

Kyaw, Aye. *Status of Women in Family Law in Burma and Indonesia, Crossroads: An Interdisciplinary Journal of Southeast Asian Studies, Vol.4, No.1, Special Burma Studies Issue (Fall 1988).* Illinois, Center for Southeast Asian Studies, 1988.

Latip, Yansen Dermanto. *Pilihan Hukum dan Pilihan Forum Dalam Kontrak Internasional* (translation: The Choice of Law and Choice of Forum in International Contracts), Dissertation. Jakarta, Fakultas Hukum Universitas Indonesia, 2002.

Loon, Hans van. *News from The Hague – The Hague Conference on Private International Law: Work in Progress (2008-2010)*, YBPIL 12 (2010), 419-433.

Lukito, Ratno. *Hukum Sakral dan Hukum Sekuler, Studi Tentang Konflik dan Resolusi Dalam Sistem Hukum Indonesia* (Scared and Secular Laws: A Study of Conflict and Resolution in Indonesia), Dissertation. Jakarta, Pustaka Alvabet, 2008.

Lukito, Ratno. *Trapped Between Legal Unification and Pluralism, The Indonesian Supreme Court's Decision on Interfaith Marriage* in Gavin W. Jones, Chee Heng Leng, Maznah Mohamad (Ed.), *Muslim-Non-Muslim Marriage, Political Contestations in Southeast Asia.* Singapore, ISEAS-Yusof Ishak Institute, 2009.

Lukito, Ratno. *The Enigma of Legal Pluralism in Indonesian Islam: The Case of Interfaith Marriage*, 10 Jurnal Islamic law and Culture, Vo.10, No.2, July 2008, pp.176-187.

Mahbubani, Kishmore, Jeffery Sng. *Keajaiban ASEAN Penggerak Perdamaian, (ASEAN Miracle A Catalyst for Peace)*. Jakarta, PT Gramedia Pustaka Utama, 2017.

Mair, Jane and Asin Örücü (Eds.). *The Place of Religion in Family Law: A Comparative Search.* Cambrige: Intersentia, 2011.

Manan, Bagir. *Konvensi Ketatanegaraan* (translation: Constitutional Convention). Bandung, Armico, 1987.

Mansel, Heinz-Peter. *Nationality* in *Encyclopedia of Private International Law*, (ed.) Jürgen Basedow, Giesel Rühl, Franco Ferrari, Pedro De Miguel Asensio, (Cheltenham: Edward Elgar Publishing Limited, 2017).

Masilamani, Logan and Jimmy Peterson. *The "ASEAN Way": The Structural Underpinnings of Constructive Engagement.* Foreign Policy Journal, 15 October 2015.

Maung, Maung. *Law and Custom in Burma and the Burmese Family.* The Hague, Martinus Nijhoff, 1963.

Meeusen, Johan, Marta Pertegás, Gert Straetmans, Frederik Swennen (eds.), *International Family Law for the European Eunion.* Antwerpen, Intersentia, 2007.

Meliala, Djaja S. *Perkembangan Hukum Perdata Tentang Orang dan Hukum Keluarga* (translation: Development of Civil Law on Person and Family Law), 2nd revised Ed.. Bandung, Nuansa Aulia, 2006.

Meliala, Djaja S. *Hukum Perdata Dalam Perspektif BW* (translation: Civil Law According to BW Perspective). 3rd revised Ed.. Bandung, Nuansa Aulia, 2014.

Merkin, Robert and Johanna Hjalmarsson. *Singapore Arbitration Legislation: Annotated,* 2nd Ed.. Oxon and New York, Informa Law From Routledge, 2016.

Moegono. *Hukum dan Moral.* Varia Advokat Vol.1 April 2008.

Mubarok, H. Jaih. *Pembaruan Hukum Perkawinan di Indonesia* (translation: Development of Marriage Law in Indonesia). Bandung, Simbiosa Rekatama Media, 2015.

Nasution, Khoiruddin. *Status Wanita di Asia Tenggara: Studi Terhadap Perundang-undangan Perkawinan Muslim Kontemporer di Indonesia dan Malaysia* (translation: Woman Status in Southeast Asia: Study on the Contemporary Moslem Marriage in Indonesia and Malaysia). Jakarta, INIS, 2002.

Nischalke, Tobias Ingo. *Insight from ASEAN's Foreign Policy Cooperation: The "ASEAN Way", a real spirit or a phantom?* Contemporary Southeast Asia, Vol.22, No.1, April 2000.

Nurcholis, Ahmad and Ahmad Baso (ed.). *Pernikahan Beda Agama, Kesaksian, Argumen Keagamaan, dan Analisis Kebijakan* (translation: Interfaith Mixed Marriage, Testimonies, Religious Arguments, and Policies Analysis), 2nd ed., Jakarta, Komisi Nasional Hak Asasi Manusia (Komnas HAM), 2010.

Nygh, Peter. *The Hague Marriage Convention – A Sleeping Beauty?,* in A. Borras et al (eds.), at E Pluribus Unum, (The Netherlands: Kluwer Law International: 1996), pp.253-267.

Paålsson, Leenard. *Marriage and Divorce in Comparative Conflict of Laws.* Leiden, A.W. Sijthoff, 1974.

Paålsson, Leenard. *Marriage in Comparative Conflict of Laws: Substantive Conditions.* The Hague, Martinus Nijhoff Publishers, 1981.

Panjaitan, Hulman. *Kumpulan Kaidah Hukum Putusan Mahkamah Agung Republik Indonesia Tahun 1953-2008 Berdasarkan Penggolongannya.* (translation: Compilation of the Decisions of Supreme Court of the Republic of Indonesia on 1953-2008 based on it Categorisation). Jakarta, Prenadamedia Group, 2014.

Peng, Hor, Kong Phallack, Jörg Menzel (eds.). *Introduction to Cambodian Law.* Cambodia, Konrad-Adenauer-Stiftung, 2012.

Pintens, Walter. *CIEC/ICCS (International Commission on Civil Status)*, in Jürgen Basedow, Giesela Rühl, Franco Ferrari, Pedro de Miguel Asensio (Ed.), *Encyclopedia of Private International Law*. Cheltenham, UK; Northampton, MA, USA: Edwar Edgar Publishing, 2017.

Prawirohamidjojo, R. Soetojo. *Pluralisme Dalam Perundang-undangan Perkawinan di Indonesia* (Pluralism in Marriage Law and Regulations in Indonesia). Dissertation. Surabaya, Universitas Ailangga, 1988.

Prins, J. *Prof. Dr. J. Prins Tentang Hukum Perkawinan di Indonesia* (translation: Prof. Dr. J. Prins regarding Marriage Law in Indonesia). Jakarta, PT. Ghalia Indonesia, 1982.

Prodjohamidjojo, Martiman. *Hukum Perkawinan Indonesia* (translation: Indonesian Marriage Law). Jakarta, PT. Abadi, 2001.

Prodjohamidjojo, Martiman. *Tanya Jawab Undang-undang Perkawinan* (translation: Question and Answers of Marriage Law), 4th print, Jakarta, Indonesia Legal Center Publishing, 2005.

Projodikoro, Wirjono. *Asas-asas Hukum Perdata Internasional* (translation: Principles of Private International Law), 5th Ed.. Bandung, Sumur Bandung, 1979.

Projodikoro, Wirjono. *Hukum Antar-Golongan di Indonesia* (translation: Inter-Legal Law in Indonesia). Bandung, Sumur Bandung, 1976.

Projodikoro, Wirjono. *Hukum Perkawinan di Indonesia* (translation: Marriage Law in Indonesia), 9th revised Ed.. Bandung, Sumur Bandung, 1991.

Pudja, Gde. *Pengantar tentang Perkawinan Menurut Hukum Hindu (Didasarkan Manusmriti)* (translation: Introduction to the Marriage Law according to Hindu Law (according to *Manusmriti*). Jakarta: Maya Sari, 1979.

Puspha Thambipillai and J. Saravanamuttu. *ASEAN Negotiations – Two Insights.* Singapore, ISEAS, 1985.

Puspokusumo, R.M. Talib. S.H. (ed.). *Perencanaan Pembangunan Hukum Nasional Bidang Private International Law* (translation: *National Legislation Development Planning in the Field of Private International Law*), (Jakarta: Badan Pembinaan Hukum Nasional, Departemen Hukum dan hak Asasi Manusia RI, 2019).

Radjagukguk, Erman. *Arbitrase Dalam Putusan Pengadilan* (translation: Arbitration in the Decision Courts). Jakarta, Chandra Pratama, 2000.

Ramulyo, Mohd. Idris. *Hukum Perkawinan Islam, Suatu Analisis dari Undang-undang No.1 tahun 1974 dan Kompilasi Hukum Islam* (translation: Islamic Marriage Law, An Analysis from the Law No.1 of 1974 and the Islamic Law Compilation), 5th print, 2nd Ed.. Jakarta, Bumi Aksara, 2004.

Rasjidi, Lili. *Hukum Perkawinan dan Perceraian di Malaysia dan Indonesia* (translation: Mariage and Divorce Law in Malaysia and Indonesia). Bandung, Penerbit PT Remaja Rosdakarya, 1991.

Rato, Dominikus. *Hukum Adat Kontemporer* (Translation: Contemporer Customary Law). Surabaya, LaksBang Justisia, 2015.

Rato, Dominikus. *Hukum Perkawinan Dan Waris Adat di Indonesia (Sistem Kekerabatan dan Pewarisan menurut Hukum Adat)* (translation: Customary Marriage and Inheritance Law in Indonesia (Kinship and Inheritance System according to Customary Law)) 2nd Ed.. Yogyakarta, LaksBand PRESSindo, 2015.

Reimann, Mathias W. *Better Law Approach,* in Jürgen Baseow, Giesela Rühl, Franco Ferrari, Pedro de Miguel Asensio (Ed.), *Encyclopedia of Private International Law*, (Cheltenham, UK; Northampton, MA, USA: Edwar Edgar Publishing, 2017).

Rooij, R. van and M.V. Polak, *Private International Law in the Netherlands.* The Hague: T.M.C. Asser Instituut, 1986.

Sairin, Weinata and J.M. Pattiasina. *Pelaksanaan Undang-undang Perkawinan dalam Persektif Kristen, Himpunan Telaah tentang Perkawinan di Lingkungan Persekutuan Gereja-gereja di Indonesia* (translation: Implementation of Marriage Law in Christianity Perspective, the Compilation of Analysis on Marriage in the Communion of Churches in Indonesia), 2nd Ed.. Jakarta, Penerbit BPK Gunung Mulia, 1996.

Saleh, K. Wantjik. *Hukum Perkawinan Indonesia* (translation: Indonesian Marriage Law). 4th Ed.. Jakarta, Ghalia Indonesia, 1976.

Saleh, K. Wantjik. *Himpunan peraturan dan Undang-undang tentang Perkawinan* (translation: Compilation of Law and Regulations of Marriage). Jakarta, PT Ichtiar Baru-Van Hoeve, 1974.

Sen, B.K. *Women and Law in Burma.* Legal Issues on Burma Journal No.9, August 2001. Burma Lawyers' Council, available at https://www.ftcam.de/ft_files/Scheidung_Myanmar2.pdf

Severino, H.E. Rodolfo C. Jr. ASEAN Secretary-General. *Reforms and Integration in East Asia Could Strengthen Regional Stability* (14 August 1999), available at http://www.aseansec.org/golek.html

Siehr, Kurt. *Family Unions in Private International Law.* Netherland International Law Review, 50, 2003.

Sihombing, Sihar. *Hukum Keimigrasian dalam Hukum Indonesia* (translation: Immigration Law in Indonesian Laws and Regulations). Jakarta, Nuansa Aulia, 2013.

Soekanto, Soerjono. *Hukum Adat Indonesia* (translation: Indonesian Custamary Law), 2nd Ed.. Jakarta, PT RajaGrafindo Tinggi, 2008

Soekanto, Soerjono. *Intisari Hukum Keluarga* (translation: Digest of Family Law). Bandung, Penerbit PT Citra Aditya Bakti, 1992.

Soemadiningrat, Otje Salman. *Pelaksanaan Hukum Waris di Daerah Cirebon Dilihat dari Hukum Waris Adat dan Hukum Waris Islam* (translation: Implementation of Inheritance Law in Cirebon, the perspective of Adat Inheritance Law and Islam Interitance Law). Dissertation. Bandung: PPS Unpad, 1992.

Soemadiningrat, Otje Salman. *Rekonseptualisasi Hukum Adat Kontemporer* (translation: The Reconceptualisation of Contemporer Adat Law). Bandung, Alumni, 2002.

Soepomo. *De Verhouding van Individu en Gemenschap in het Adatrecht,* Batavia, JB Wolters, 1941, translated by himself in Soepomo, *Hubungan Individu dan Masyarakat dalam Hukum Adat* (translation: Relation of Individual and Society in Adat Law). Jakarta, Pradnya Paramita, 1951.

Subadio, Ny. Maria Ullfah. *Perjuangan untuk Mencapai Undang-undang Perkawinan* (translation: The Strive for Enactment of Marriage Law). Jakarta, Yayasan Idayu, 1981.

Subekti. *Hukum Adat Indonesia dalam Yurisprudensi Mahkamah Agung* (translation: Indonesian Adat Law in Jurispudences of the Supreme Court). Bandung, Penerbit Alumni, 2006.

Subekti. *Pokok-pokok Hukum Perdata* (translation: Principles of Civil Law), 28th ed.. Jakarta, PT Intermasa, 1996.

Sudo, Sueo. *The Fukuda Doctrine and ASEAN: New Dimensions in Japanese Foreign Policy*. Institute of South Asian Studies, 1992.

Sulastriyono. *Hukum Keluarga dan Harta Perkawinan Adat* in *Hukum tentang Orang, Hukum Keluarga dan Hukum Waris di Belanda dan Indonesia* (translation: Family Law and Adat Matrimony Asset Law in Law of Person, Family Law and Inheritance law in Netherlands and Indonesia). Bali, Pustaka Larasan, 2012.

Sultana, Mh. Faradhaz. *Kelamin Ganda Penyakit atau Penyimpangan Gender*, 2011, available at http://pustaka-juned.blogspot.nl/2012/02/kelamin-ganda-penyakit-atau.html

Sumampouw, Mathilde. *Pilihan Hukum Sebagai Pertalian Dalam Perjanjian Internasional* (translation: The Choice of Law as a Connecting Factor in International Contracts), Dissertation. Jakarta, Faculty of Law of University of Indonesia, 1968.

Suparman, Eman. *Pilihan Forum Arbitrase dalam Sengketa Komersial Untuk Penegakkan Keadilan* (translation: The Arbitration Choice of Forum in Commercial Dispute In Justice Enforcement), Dissertation. Jakarta, Tatanusa, 2004.

Supriadi, Wila Chandrawila. *Hukum Perkawinan Indonesia dan Belanda, Suatu Penelitian Sejarah Hukum Perbandingan Tentang Hukum Perkawinan Indonesia dan Belanda Dalam Periode Tahun 1945 Sampai Sekarang* (Dutch and Indonesian Marriage Law, A Historical Comparative Study on Dutch and Indonesian Marriage Law since 1945). Dissertation. Bandung, Penerbit Mandar Maju, 2002.

Surahno, Tiurma M.P. Allagan, etc.. *Hak Kekayaan Intelektual* (translation: Intelectual Property Rights). Banten, Penerbit Universitas Terbuka, 2015.

Susanti, Ida. *The Conflict Rules on the Protection of the rights of migrant workers.* Dissertation. Groningen, Ulrik Huber Institute for Private International Law, 2008.

Sutherland, Elaine E. (ed.). *The Future of Child and Family Law: International Prediction,* Cambrige: Cambrige University Press, 2012.

Syahuri, Taufiqurrohman. *Legalisasi Hukum Perkawinan di Indonesia, Pro-Kontra Pembentukannya Hingga Putusan Mahkamah Konstitusi,* (translation: Legalization of Marriage Law in Indonesia, Pro-Contra of Its Establishment Until the Decision of Constitutional Supreme Court). Jakarta, Kencana, 2013..

Syarifuddin, Amir. *Hukum Perkawinan Islam di Indonesia, Antara Fiqh Munakahat dan Undang-undang Perkawinan* (translation: Islamic Marriage Law in Indonesia, Between *Fiqh Munakahat* and Marriage Law), 4th Ed.. Jakarta, Kencana, 2011.

Symeonides, Symeon C. *Private International Law Codification in a Mixed Jurisdiction: the Lousiana experience, RablesZ* 1993, pp.460-516.

Symeonides, Symeon C. *Private International Law: Idealism, Pragmatism, Ecleticsm, General Course on Private International Law.* The Hague Academy of International Law, 2017.

Symeonides, Symeon C. *The Conflict Book of the Lousiana Civil Code: Civilian, American or Original?, Tulane Law Review, 2009,* pp.1042-1081.

Taylor, Jean Gelman. *The Social World of Batavia, European and Eurasian in Dutch Asia.* Wisconsin, The University of Wisconsin Press, 1983.

Thalib, Sayuti. *Hukum Kekeluargaan Indonesia Berlaku Bagi Umat Islam Disertai Beberapa Pengertian Umum Hukum Perkawinan 1974* (translation: Indonesian Family Law upon the Moslem and Certain of General Principles of Marriage Law of 1974) 6th revised Ed.. Jakarta, Penerbit Universitas Indonesia (UI-Press), 2009.

Trubek, David M. Parrick Cottrell and Mark Nance. *"Soft Law", "Hard Law" and European Integration: Toward a theory of Hybridity*. Research Paper No.1002, University of Wisconsin Legal Studies, 2004).

Tuegeh-Longdong, Tineke Louise. *Asas Ketertiban Umum dan Konvensi New York 1958, Sebuah Tinjauan atas Pelaksanaan Konvensi New York 1958 pada Putusan-putusan Mahkamah Agung RI dan Pengadilan Asing,* Dissertation. Bandung, Penerbit PT Citra Aditya Bakti, 1998.

Wahyuni, Sri. *Nikah Beda Agama Kenapa ke Luar Negeri?* (translation: Why shoud Inter-faith Mixed Marriage go abroad?). Yogyakarta, Alfabet, 2016.

Wardhono, Dwi Thahja Kusumo. *Establishing an Integrated Payment System (Real-Time Gross Settlement) in ASEAN, A proposal for a Cross Border Payment Mechanism to Support the AEC 2015.* Groningen, Ulrik Huber Institute for Private International Law, 2015.

Wibowo, Basuki Rekso. *Arbitrase Sebagai Alternatif Penyelesaian Sengketa Perdagangan di Indonesia* (translation: Arbitration as An Trading Dispute Settlement in Indonesia). Dissertation. Surabaya, FH Universitas Airlangga, 2007.

Widhiatmoko, Bambang and Eddy Suyanto. *Legalitas Jenis Kelamin pada Penderita Ambiguous Genetalia di Indonesia* (translation: Legal Aspect of Sexual Identity of the Ambiguous Genitals Patients in Indonesia). Jurnal Kedokteran Forensik Indonesia, Vol. 15 No.1, Jan-March 2013.

Wignjodipoero, Soerojo. *Pengantar dan Asas-asas Hukum Adat* (translation: Introduction and Principles of Adat Law). Jakarta, Toko Gunung Agung, 1995.

Wolde, Mathijs H. ten and K.C. Heckel. *European Private International Law: A Comparative Perspective on Contracts, Torts and Corporations.* Groningen, Ulrik Huber Institute for Private International Law, 2012.

Wolde, Mathijs H. ten. *"Professionals in other countries be able to rely on a European Certificate of Inhertance for all purpose?"* in *Les Successions Internationales dans lÚE. Perspectives pour une Harmonization,* (Würzburg: Deutschen Notarinstitut (DNotl), 2004), pp.503-514.

Yew, Lee Kuan. *Opening Address in Joint Communique of the Fifteenth ASEAN Ministerial Meeting* in Singapore, 14-16 June 1982, available at http://asean.org/joint-communique-of-the-fifteenth-asean-ministerial-meeting-singapore-14-16-june-1982/

Zuraida, Tin. *Prinsip Eksekusi Putusan Arbitrase Internasional di Indonesia, Teori dan Praktek Yang Berkembang,* Dissertation. Surabaya, PT. Wastu Lanas Grafika, 2009.

Zweigert, K. and H. Kötz. *An Introduction to Comparative Law.* Translated from German by Tony Weir, 3rd Ed.. Oxford, Clarendon Press, 1998.

Articles, Homepage, Websites retrieved from internet

ACWC. ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC), Official Website available at https://acwc.asean.org/about/

APEC. Asia-Pasific Economic Cooperation (APEC) Official Website available at http://www.apec.org/About-Us/About-APEC/Member-Economies.aspx

ASEAN. Association of Southeast Asian Nations (ASEAN) Official Website available at http://www.asean.org/asean/about-asean/overview

-------. *ASEAN Declaration (Bangkok Declaration) 1967,* available at: http://asean.org/asean/about-asean/.

-------. Cebu Declaration 2007 at http://asean.org/cebu-declaration-on-th-acceleration-of-the-establishment-of-an-asean-community-by-2015/

-------. "Declaration of ASEAN Concord II (Bali Concord II) 2003", available at http://asean.org/?static_post=declaration-of-asean-concord-ii-bali-concord-ii-2

-------. *The Founding of "ASEAN" Association of Southeast Asian Nations (ASEAN)*, available at: http://asean.org/asean/about-asean/history/

-------. *ASEAN Free Trade Agreement* available at http://asean.org/asean-economic-community/asean-free-trade-area-afta-council/

-------. *ASEAN Vision 2025: Forgoing Ahead Together*, available at http://www.asean.org/storage/2015/12/ASEAN-2025-Forging-Ahead-Together-final.pdf.

-------. *ASEAN-Republic of Korea Dialogue Relations*, available at http://asean.org/asean/external-relations/republic-of-korea-rok

-------. *Hanoi Plan of Action on 6th ASEAN Summit 1998*, available at http://asean.org/?static_post=hanoi-plan-of-action.

-------. *ASEAN Economic Community 2025 Consolidated Strategic Action Plan*, available at http://asean.org/aec-2025-consolidated-strategic-action-plan/

-------. *ASEAN Economic Community*, available at http://asean.org/asean-economic-community/

ASEAN Law Association. *Legal Systems in ASEAN, Brunei Darussalam*, available at http://www.aseanlawassociation.org/papers/Brunei_chp2.pdf

European Commission, *Green Paper, Less bureaucracy for citizens: Promoting free movement of public documents and recognition of the effects of civil status records*, available at http://ec.europa.eu/justice/newsroom/civil/opinion/110510_en.htm

European Union. European union (EU) Official Website available at https://europa.eu/european-union/about-eu/eu-in-brief_en

Gender Equality Network, *Myanmar Laws and CEDAW, The Case for Anti-Violence Against Women Law, Briefing Paper: Background, Legal Analysis and Case Studies from Cambodia, Thailand and Vietnam*, Gender Equality Network, January 2013, available at http://www.burmalibrary.org/docs20/Myanmar_Law+CEDAW-en-red.pdf

HCCH, Hague Conference on private International Law (HCCH) Official Website available at https://www.hcch.net/en/home

-------. HCCH Members, available at https://www.hcch.net/en/states/hcch-members.

-------. *The Hague Marriage Convention,* available as "The outline of Convention" at its official website: https://www.hcch.net/en/instruments/conventions/full-text/?cid=88

-------. The List of Hague Conference conventions in relation to the family and civil matters, available at https://www.hcch.net/en/instruments/conventions

-------. *The ABCs of Apostilles How to ensures that your public documents will be recognized abroad,* available at https://www.hcch.net/en/instruments/conventions/specialised-sections/apostille

-------. HCCH Other Connected States available at its official website https://www.hcch.net/en/states/other-connected-states.

Hukumonline. "*Kewajiban Legalisasi Dokumen Yang Ditandatangani di Luar Negeri*" http://www.hukumonline.com/klinik/detail/cl2168/dokumen-yg-ditandatangani-di-luar-negeri.

ICCS. International Commission on Civil Status (ICCS). The official website at www.ciec1.org

Javapost, *Gehuwd Per Volmacht* avaliable at https://javapost.nl/2013/02/08/gehuwd-per-volmacht/ .

MERCOSUR or the Mercado Comun del Sur also known as the Common Market of the South. The official website of MERCOSUR available at http://www.mercosur.int/

OHADA. The official website of http://www.ohada.org/index.php/en/ohada-in-a-nutshell/general-overview

Philipphine. The population in Philippine, avaliable at https://www.cia.gov/library/publications/resources/the-world-factbook/geos/rp.html

Purboyo W. Susilaradeya, the priest at Gereja Kristen Indonesia (GKI) Pondok Indah at http://gkipi.org/pernikahan-beda-agama-dalam-perspektif-gki/ accessed on 2 April 2015.

Report: Family values at forefront of LGBT youth discrimination in Cambodia, Asian Correspondent, available at https://asiancorrespondent.com/2015/12/report-family-values-at-forefront-of-lgbt-youth-discrimination-in-cambodia/

The Brunei Times. *"Brunei urged to raise minimum age of marriage"* available at http://www.bt.com.bn/news-national/2015/03/14/brunei-urged-raise-minimum-age-marriage#sthash.qWyn6sul.dpbs.

UNCITRAL. The official website of UNCITRAL available at http://www.uncitral.org/uncitral/en/about_us.html

-------. The CISG 1980, the official website of UNCITRAL available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html

UNIDROIT. The official website of UNIDROIT available at http://www.unidroit.org/about-unidroit/overview

United Nations, available at: http://www.un.org/en/member-states/index.html

-------. The list of the parties to the International Covenant on Economic, Social and Cultural Rights, available at the official website of United Nations: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en

-------. The list of the parties to the International Covenant on Civil and Political Rights, available at the official website of United Nations: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en.

-------. The list of the parties to the International Covenant on Optional Protocol to the International Covenant on Civil and Political Rights, available at the official website of United Nations: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&clang=_en

-------. The list of the parties to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming the abolition of the death penalty, available at the official website of United Nations: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-12&chapter=4&clang=_en.

-------. The list of the parties to the International Covenant on Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, available at the official website of United Nations: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XVIII-4&chapter=18&Temp=mtdsg3&clang=_en

-------. The list of the parties to the International Covenant on Protocol to the Status of Refugees, available at the official website of United Nations: https://treaties.un.org/PAGES/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&clang=_en

Vietnam Law Magazine. *New Law on Marriage and Family*, on *Vietnam Law and Legal Forum* updated on 5 August 2015, available at http://vietnamlawmagazine.vn/new-law-on-marriage-and-family-4067.html

Wakil Indonesia untuk AICHR, *Prospek Mekanisme HAM ASEAN*, available at http://aichr.or.id/index.php/id/aichr-indonesia/akuntabilitas-publik/rilis/23-prospek-mekanisme-ham-asean?showall=1&limitstart

WIPO. World Intellectual Property Organization (WIPO), the official website available at http://www.wipo.int/about-wipo/en/

Regulations, Conventions, Reports and other documentary resources

ASEAN, *ASEAN Declaration (Bangkok Declaration) 1967,* available at: http://asean.org/asean/about-asean/.

-------. *ASEAN Human Rights Declaration,* available at *http://asean.org/phnom-penh-statement-on-the-adoption-of-the-asean-human-rights-declaration-ahrd/*

-------. *A Blueprint for growth, ASEAN Economic Community 2015: Progress and Key Achievements*. Jakarta, Asean Secretariat, 2015.

-------. *ASEAN Economic Community 2025 Consolidated Strategic Action Plan*, available at http://asean.org/aec-2025-consolidated-strategic-action-plan/

-------. *ASEAN Economic Community Blueprint 2025*. Jakarta, ASEAN Secretariat, 2015.

-------. *ASEAN Economic Community*, available at http://asean.org/asean-economic-community/

-------. *Cebu Declaration 2007*, available at http://asean.org/cebu-declaration-on-th-acceleration-of-the-establishment-of-an-asean-community-by-2015/.

-------. *Declaration of ASEAN Concord II (Bali Concord II) 2003*, available at http://asean.org/?static_post=declaration-of-asean-concord-ii-bali-concord-ii-2

-------. *Hanoi Plan of Action on 6th ASEAN Summit 1998*, available at http://asean.org/?static_post=hanoi-plan-of-action

-------. Term of Reference of AICHR, available at http://asean.org/asean-political-security-community/asean-intergovernmental-commission-on-human-rights-aichr/other-documents/

-------. *The Association's Treaty of Amity and Cooperation 1976*, available at http://asean.org/treaty-amity-cooperation-southeast-asia-indonesia-24-february-1976/

-------. Term of Reference of ACWC, available at http://asean.org/?static_post=terms-of-reference-of-asean-on-the-promotion-and-protection-of-the-rights-of-women-and-children

-------. *The Joint Press Statement of the 9th ASEAN ASLOM 23-24 August 2004, Brunei Darussalam*, available at http://asean.org/?static_post=joint-press-statement-of-the-9th-asean-senior-law-officials-meeting-aslom-23-24-august-2004-brunei-darussalam

Brunei Darussalam, The Chinese Marriage Act. Available at: *www.agc.gov.bn/AGC%20Images/LAWS/ACT_PDF/cap126.pdf*

-------. The Marriage Act, avilabel at *www.agc.gov.bn/AGC%20Images/LAWS/ACT_PDF/cap076.pdf*

-------. The Brunei Islamic Family Law. *www.agc.gov.bn/AGC%20Images/LAWS/ACT_PDF/cap217.pdf*

-------. The Registration of Marriages Act, available at *www.agc.gov.bn/AGC%20Images/LOB/PDF/Cap124.pdf*

Cambodia, Cambodian Civil Code.

Cambodia, Law on Monogamy.

Cambodia. Cambodia Civil Code.

Cambodia. Cambodia Marriage Law 1989.

Cambodia. Cambodian Constitution.

Cambodia. The Diplomatic Note of the Cambodian Minister of Foreign Affairs dated 7 March 2011. See the US Diplomatic in Cambodia, *Getting Marriage in Cambodia*, available at https://kh.usembassy.gov/u-s-citizen-services/local-resources-of-u-s-citizens/getting-married-in-cambodia/

Cambodia. The Sub-decree of the Royal Government of Cambodia No.183 ANKR.BK regarding the Process and Legal Procedure of Marriage Between Cambodian Citizen and Foreign National.

International Court of Justice, Nottebohm Case (Second Phase) Judgement of 6th April 1955: ICJ Report.

Lao PDR, Marriage Law, Law No.97/P dated 24 December 1990.

Lao PDR. Lao PDR's Marriage Law.

Lao PDR. The Decree No.198/PM.

Malaysia, Law Reform on Marriage and Divorce, Act No.164 of 1976.

Malaysia, Malaysia Islamic Family Law, Act No.303 of 1984.

Myanmar, Law Application of Monogamy System, Law No.54/15 dated 31 August 2015.

Myanmar. Myanmar Buddhist Women's Special Marriage Law, Law of 2015.

Indonesia. Algemene Bepalingen Wetgeving voor Netherlands Indië. State Gazette No.23 of 1847.

-------. *Burgerlijke Stand voor Europeanen*. State Gazette No.25 of 1849.

-------. Regulation of Civil Registry of Mixed Marriage. State Gazette No.279 of 1904.

-------. Regulation regarding the Registry Office of European Group. State Gazette No.75 of 1919.

-------. Regulation regarding the Registry Office of Chinesse Group. State Gazette No.130 of 1919 jo. State Gazette No.81 of 1919.

-------. Regulation regarding Civil Registry to certain groups of Indonesian Native in Java and Madura. State Gazette No.751 of 1920 jo State Gazette No.564 of 1927.

-------. *Regeling op de Gemengde Huwelijken* (GHR) (Regulation regarding the Mixed Marriage). State Gazette No.158 of 1989.

-------. *Indische Staatsregeling*. State Gazette No.415 of 1925.

-------. *Huwelijksordonantie Christen Indonesia* (HOCI). State Gazette No.74 of 1933.

-------. Indonesian Consitution 1945.

-------. Law No.3 of 1946 regarding the Nationality and Resident of Indonesia (no State Gazette), as amended by the Law No.6 of 1947 regarding the Amendment to Law No.3 of 1946 regarding Nationality and Resident of Indonesia, amended by Law No.8 of 1947 regarding Extension of Submission of Nationality Statement and Law No.11 of 1948 regarding Re-extension of Submission of Nationality Statement (no State Gazette).

-------. Law No.22 of 1946 regarding Registration of Marriage, Divorce and Reconciliation in Java and Madura Area (no State Gazette).

-------. Law No.32 of 1954 regarding Establishment of Law dated 21 November 1946 No.22 of 1946 regarding Registration of Marriage, Divorce and Reconciliation in entire area outside of Java and Madura, dated 26 October 1954, State Gazette No.98 of 1954.

-------. Law No.62 of 1958 regarding Nationality of the Republic of Indonesia, State Gazette No.113 of 1958; as amended by Law No.18 of 1976, State Gazette No.20 of 1976 regarding Amendment to Article 18 of Law No.62 of 1958 regarding the Nationality of the Republic of Indonesia, State Gazette No.20 of 1976.

-------. Law No.5 of 1960 regarding Basic Agrarian Law, dated 24 September 1960, State Gazette No.104 of 1960.

-------. Law No.1/PNPS/1965 regarding *Pencegahan Penyalahgunaan dan/atau Penodaan Agama.* State Gazette No.3 of 1965.

-------. Law No.1 of 1967 regarding the Foreign Investment Law. State Gazette No.1 of 1967.

-------. Law No.5 of 1968 regarding Dispute Settlements between the State and Nationals of Other States in relation to the Capital Investments. State Gazette No.32 of 1968.

-------. Law No.1 of 1974 regarding Marriage Law. State Gazette No.1 of 1974.

-------. Law No.4 of 1979 regarding Children Welfare. State Gazette No.32 of 1979.

-------. Law No.7 tahun 1984 regarding Ratification of Convention on the Elimination of All Forms of Discrimination Against Women, State Gazette No.84 of 1984.

-------. Law No.12 of 1995 regarding Correctional Institution (*Pemasyarakatan*). State Gazette No.77 of 1995.

-------. Law No.3 of 1997 regarding Child Court. State Gazette No.3 of 1997.

-------. Law No.30 of 1999 regarding Arbitration and Alternative Dispute Settlement, State Gazette No. 138 of 1999.

-------. Law No.39 of 1999 regarding Human Rights. State Gazette No.165 of 1999.

-------. Law No.41 of 1999 regarding Forestry. State Gazette No.167 of 1999.

-------. Law No.42 of 1999 regarding Fiduciary Security. State Gazette No.168 of 1999.

-------. Law No.30 of 2000 regarding Trade Secrets. State Gazette No.242 of 2000.

-------. Law No.31 of 2000 regarding Industrial Design. State Gazette No.243 of 2000.

-------. Law No.32 of 2000 regarding Integrated Circuit Design. State Gazette No.244 of 2000.

-------. Law No.14 of 2001 regarding Patent. State Gazette No.109 of 2000.

-------. Law No.15 of 2001 regarding Trademark. State Gazette No.110 of 2001.

-------. Law No.23 of 2002 regarding Child Protection. State Gazette No.109 of 2002.

-------. Law No.13 of 2003 regarding Emplyoment. State Gazette No.39 of 2003.

-------. Law No.24 of 2003 regarding Constitutional Supreme Court. State Gazette No.98 of 2001.

-------. Law No.23 of 2004 regarding Abolishing of Domestic Violence. State Gazette No.95 of 2004.

-------. Law No.30 of 2004 regarding Position of Notary. State Gazette No.117 of 2004.

-------. Law No.32 of 2004 regarding Regional Government. State Gazette No.125 of 2004.

-------. Law No.40 of 2004 regarding National Social Security System. State Gazette No.150 of 2004.

-------. *Peraturan Pemerintah Pengganti Undang-Undang* No.3 of 2005 regarding the Amendment to Law No.23 of 2004 regarding Regional Government. State Gazette No.38 of 2005.

-------. Law No.12 of 2006 regarding Nationality of the Republic of Indonesia. State Gazette No.63 of 2006.

-------. Law No.23 of 2006 regarding Civil Administration. State Gazette No.124 of 2006, as amended to Law No.24 of 2013 regarding the Amendment to Law No.23 of 2006 regarding Civil Administration. State Gazette No.232 of 2013.

-------. Law No.21 of 2007 regarding Eradication of Human Trafficking Crime. State Gazette No.58 of 2007.

-------. Law No.25 of 2007 regarding Investment. State Gazette No.67 of 2007.

-------. Law No.11 of 2008 regarding Electronic Information and Transaction Law. State Gazette No.58 of 2008.

-------. Law No.17 of 2008 regarding Shipping. State Gazette No.64 of 2008.

-------. Law No.44 of 2008 regarding Pornography. State Gazette No.181 of 2008.

-------. Law No.1 of 2009 regarding Aviation, State Gazette No.1 of 2009.

-------. Law No.6 of 2011 regarding Imigration. State Gazette No.52 of 2011.

-------. Law No.11 of 2012 regarding Juvenille Justice System. State Gazette No.152 of 2012.

-------. Law No.28 of 2014 regarding Copyright. State Gazette No.266 of 2014.

-------. Government Regulation No.35 of 1949 regarding Pension Grant to the Widow (and her children) of the late civil servant. No state gazette.

-------. Government Regulation No.8 of 1974 regarding *Pokok-pokok Kepegawaian* (Principles of Personnel). State Gazette No.55 of 1974.

-------. Government Regulation No.10 of 1983 regarding Permission to Marry and Divorce of Civil Servants dated 21 April 1983, State Gazette No.13 of 1983, as amended by Government Regulation No.45 of 1990 regarding the Amendment to Government Regulation No.10 of 1983 regarding Permission to Marry and Divorce of Civil Servants dated 6 September 1990 State Gazette No.61 of 1990.

-------. Government Regulation No.2 of 2007 regarding the Procedures to Acquire, Lose, Cancellate and Retrieve Nationality of the Republic of Indonesia, State Gazette No.2 of 2007.

-------. Government Regulation No.37 of 2007 regarding the Implementation of Law No.23 of 2006 regarding Civil Administration, State Gazette No.80 of 2007.

-------. Government Regulation No.42 of 2007 regarding Franchise. State Gazette No.90 of 2007.

-------. Government Regulation No.54 of 2007 regarding the Procedure of Adoption. State Gazette No.123 of 2007.

-------. Government Regulation No.53 of 2010 regarding Disciplinary of Civil Servants. State Gazette No.74 of 2010.

-------. Government Regulation No.103 Tahun 2015 regarding Ownership of Residence House or Residence Unit by a Foreigner domiciled within Indonesia. State Gazette No.325 of 2015.

-------. Presidential Decree No.34 of 1981 regarding ratification of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. State Gazette No.40 of 1981.

-------. Presidential Decree No.56 of 1996 regarding the Evidence of Indonesian Nationality. No state gazette.

-------. Regulation of Minister of Religion No.1/1994 dated 2 April 1994 regarding the Registration of Marriage Certificate between Indonesian Nationals Held Abroad *(Peraturan Menteri Agama tentang Pendaftaran Surat Bukti Perkawinan Warga Negara Indonesia Yang Dilangsungkan di Luar Negeri)*.

-------. Joint Regulation of Minister of Religion and Minister of Foreign Affairs Joint Decree of Minister of Religion and Minister of Foreign Affairs No.589 of 1999 No.182/OT/99/01 dated 13 October 1999 regarding Implementing Regulation of Marriage between the Indonesian Nationals held Abroad.

-------. Joint Regulation of Minister of Domestic Affairs and Minister of Culture and Tourism *(Peraturan Bersama Menteri Dalam Negeri dan Menteri Kebudayaan dan Pariwisata)* No.43/41 of 2009 regarding Guidelines for sevices to the believers of Faith to Almighty God *(Pedoman Pelayanan kepada Penghayat Kepercayaan Terhadap Tuhan Yang Maha Esa)*, dated 16 September 2009. Indonesia.

-------. Regulation Minister of Trade No.31/M-DAG/PER/2008 regarding Franchise.

-------. Decision Letter of the Health Minister of Indonesia No.292/MENKES/SK/III/1989 dated 12 June 1989 regarding plastic surgery and reconstruction.

-------. Decision Letter of Minister of Justice No.M 02-IZ.01.10 of 1995 regarding visa, visiting visa, limited stay visa, entry permit and imigration permit.

-------. Regulation of the Minister of Foreign Affairs No.09/A/KP/XII/2006/01 dated 28 December 2006.

-------. The Compilation of Islamic Law.

-------. The Regulation of Constitutional Supreme Court No.06/PMK/2005 regarding Proceeding of Judicial Review *(Pedoman Beracara dalam Perkara Pengujian Undang-undang)*.

-------. Circular Letter of Supreme Court No.3 of 1963 dated 4 August 1963 regarding certain articles in *Burgerlijk Wetboek* that should be considered as not applicable any longer.

-------. Circular Letter No.48/SE/1990 dated 22 December 1990 regarding Implementation Guidelines of Government Regulation No.45 of 1990 regarding the Amendment to GR No.10 of 1983 regarding Permission to Marry and Divorce for Civil Servants, from the Head of State Administration Personnel Board to all Minister of RI.

-------. Instruction Letter of regional of DKI Jakarta No.3614/075.52 dated 30 December 1988 issued by the CRO of DKI Jakarta regarding the registration of interfaith mixed marriage in the CRO of DKI Jakarta.

-------. Letter of the Head of State Personnel Board No.K-26-30/V.252.2535/99 dated 22 August 2011 regarding the Disciplinary Sanctions to Civil Servants who violate GR No.10 of 1983 jo. GR No.45 of 1990 regarding Permission to Marry and Divorce for Civil Servants.

-------. Badan Pembinaan Hukum Nasional, *Naskah Akademik RUU Tentang Hukum Perdata Internasional (Lanjutan)* (translation: the Academic Bill of Indonesian Private International Law (Revision). Jakarta, Badan Pembinaan Hukum Nasional, 2015. Available at http://bphn.go.id/layanan/res_nasmis (Point No.22).

Philippine. G.R. No.L-14628 dated 30 September 1960. Case between Fransisco Herosisima for petitioner and the Court of Appeals, available at http://www.lawphil.net/judjuris/juri1960/sep1960/gr_l-14628_1960.html . Case of R. Hermosisima promise to marry Soledad Cagigas.

-------. Philippine Family Code, Execution Order No.209 dated 6th July 1987.

Singapore. The Women's Charter as amended to date, and the latest one by the Women's Charter (Amendment) Act, No.7 of 2016 with effect from 1 July 2016.

Thailand, Civil and Commercial Code.

-------. Act of Conflict of Laws, B.E.2481.

Vietnam, Marriage Law, Law No.52/2014/QH13 dated 19 June 2014.

Vietnam. Vietnamese Marriage Law 2014.

International Conventions

HCCH. The Hague Marriage Convention of 12 June 1902 on the Law Applicable to Marriage.

-------. *The Hague Convention of Jurisdiction, Applicable Law & Recognition Decrees relating to the Adoptions*, 1965.

-------. *The Hague Marriage Convention,* September 2007, p.1, available at https://assets.hcch.net/docs/4b59dd11-e4bd-4b96-9244-513645c7658b.pdf

ICAO. The Convention on International Civil Aviation, the "Chicago Convention". See the official website available at https://www.icao.int/about-icao/Pages/default.aspx http://www.wipo.int/about-wipo/en/

United Nations. *Universal Declaration on Human Rights* (UDHR) of 1948.

-------. *International Covenant on Civil and Political Rights* of 16 December 1966 .

-------. General Assembly Resolution 429(V), *Convention Relating to the Status of Refugees of 14 December 1950*, available at http://www.unhcr.org/refworld/docid/3b00f08a27.html.

-------. *Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages*, available at https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XVI-2&chapter=16&Temp=mtdsg3&clang=_en, last accessed on 25 July 2017.

-------. *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* New York 20 January 1957, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVI-3&chapter=16&clang=_en

-------. *Convention on the Nationality of Married Women* New York 20 February 1957, available at https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XVI-2&chapter=16&Temp=mtdsg3&clang=_en, last accessed on 25 July 2017.

-------. *International Convention on the Elimination of All Forms of Racial Discrimination* on 21 December 1965, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en

-------. *International Covenant on Civil and Political Rights* on 16 December 1966, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en

-------. *International Covenant on Economic, Social and Cultural Rights* on 16 December 1966, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en

-------. *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: http://www.refworld.org/docid/3ae6b3712c.html

-------. *Convention on the Elimination of All Forms of Discrimination Against Women*, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en

-------. *Optional Protocol of the International Covenant on Civil and Political Rights*, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&clang=_en

-------. *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&clang=_en

-------. *Second Optional Protocol of the International Covenant on Civil and Political Rights, aiming at the abolishment of the death penalty*, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-12&chapter=4&clang=_en

-------. *Convention on the Right of the Child of the United Nations*, dated 20 November 1989, the Preamble.

-------. United Nations Economic and Social Council (ECOSOC), *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 7 September 1956 available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/SupplementaryConventionAbolitionOfSlavery.aspx, or http://www.refworld.org/docid/58c156dc4.html

-------. The International Covenant on Civil and Political Rights (ICCPR).

Case Law

Indonesia. The Supreme Court No.245 K/SIP/1953 dated 18 February 1955. Case of Ms. Soemarni and Mr. Medelu vs. Soemarni's father.

-------. The Supreme Court Decision dated 25 September 1959 Reg. No.387K/Sip./1958 Case of Adat Law in Central Java stipulates that a widow shall entitle half of the marital assets.

-------. The Supreme Court Decision dated 8 Agustus 1959 Reg No.258 K/Sip./1959. Case of division of marital assets cannot be claimed by any other party, except by the son or daughter of the late husband or wife.

-------. The Supreme Court Decision dated 8 July 1959 Reg.No.189 K/Sip./1959. Case of that as long as a widow is not re-married, the marital assets under her occupation shall not be divided in order to ensure her life.

-------. The Supreme Court Decision dated 9 April 1960 Reg.No.120 K/Sip./1960 stipulates that assets acquired during the marriage must be equally divided between the husband and wife.

-------. The Supreme Court Decision No.195.K/Kr/1978 dated 8 October 1978.

-------. The North-East Court Decision No.253/1978.G.

-------. The District Court Decision of PN Denpasar No.104/PN.Dps/Pid 1980.

-------. The Supreme Court Decision No.3038/K/Pdt/1981 dated 18 September 1981.

-------. The Supreme Court Decision No.854.K/Pid/1983 dated 30 October 1984.

-------. The Supreme Court Decision No.666 K/Pid/1984 dated 23 Feb 1985.

-------. The District Court Decision of PN Denpasar No.2/Pid.B/1985/PN.Dps.

-------. The District Court Decision of PN Denpasar No.25/Pid.B/1986/PN.Dps.

-------. The Supreme Court Decision No.3101 K/Pdt/1984 dated 8 February 1989.

-------. The Supreme Court Decision No.1400 K/PDT/1986 dated 29 January 1989. Case of Andy Vonny Gany (Moslem) vs. Petrus Nelwan (Christian).

-------. The District Court Decision of Tanjung Pinang No.205/Pdt.P./P/N/FPAT dated 20 May 1989. The case of inter-country adoption in Galang Island (Indonesia).

-------. The Supreme Court Decision No.61.K/Pid/1988 dated 15 March 1990.

-------. The Supreme Court Decision No.1644 K/Pid/1988 dated 15 May 1991.

-------. The Supreme Court Decision No.3898 K/Pdt/1989 dated 19 November 1992.

-------. The District Court Decision of PN Klungkung No.24/Pid/S/1992/PN.KLK.

-------. The Supreme Court decision No.3898 K/Pdt/1989 dated 19 November 1992.

-------. The Supreme Court Decision No.522 K/Sip/1994.

-------. The Supreme Court Decision No.3277 K/Pdt/2000 dated 18 July 2003.

-------. The District Court Decision of Central Jakarta No.435/Pdt/G/2003/PN.Jkt.Pst dated 7 July 2004. Case of divorce the Netherlands national vs. South African national, both are having the marital domicile in Jakarta.

-------. The Supreme Court Decision No.1398 K/Pdt/2005.

-------. The Religion Court Decision of Depok No.324/Pdt.G/2006/PA.Dpk.. Case of Elisa binti Udin Saragih vs. Darren Andrew Fouracre bin Frederick George Fouracre and Nia Erna Susanti binti Soewartono, and KUA.

-------. The Religion High Court Decision No.60/Pdt.G/2008/PTA.Sby.

-------. The Supreme Court Decision No.370/K/TUN/2003 dated 28 March 2006. Case of Gumirat Darna Alam-Susilawati case or known by "Gugum-Susi" case.

-------. The Religion High Court Decision No.60/Pdt.G/2008/PTA.Sby.

-------. The Supreme Court Decision No.1653 K/PDT/2010.

-------. Religion Court No.34/PPdt.G/2011/PA.Pdn dated 12 May 2011. Case of KUA vs Samiaro Hulu alias Soleh Hulu, Siti Tutik Isnaini, Syarifah dan Ali Imran Amir Harahap.

-------. Sangatta Religious Court No.44/Pdt.P/2012/PA.Sgta.

Indonesia. The Decision of Constitutional Supreme Court No.12/PUU-V/2007 regarding the polygamy.

Indonesia. The Decision of Constitutional Supreme Court No.15/PUU-V/2007 dated 27 November 2007.

Indonesia. The Contitutional Supreme Court No.37-39/PUU-VIII/2010 dated 15 October 2010.

Indonesia. The Decision of Constitutional Supreme Court No.49/PUU-IX/2011 dated 18 October 2011.

Indonesia. The Constitutional Supreme Court No.68/PUU-XII/2014.

Indonesia. The Constitutional Supreme Court No.69/PUU-XIII/2015 dated 27 October 2016.

Indonesia. The Minutes of Meeting of Constitutional Supreme Court of the Republic of Indonesia No.68/PUU-XII/2014 dated 5 November 2014 regarding Judicial Review of MA 1974 towards Indonesian Constitution, Agenda: the opinions of MUI, PBNU, WALUBI and PGI (V).

Indonesia. The Minutes of Meeting of Constitutional Supreme Court of the Republic of Indonesia No.68/PUU-XII/2014 dated 24 November 2014 regarding Judicial Review of MA 1974 towards Indonesian Constitution, Agenda: the opinions of KWI, PDHI, and MATAKIN (VI).

Indonesia. Case of *Partini and Sartono.*

Summary

The Association of Southeast Asian Nations or better known as "ASEAN" is an intergovernmental regional organization established in 1967. Now comprising ten member states (hereinafter referred to as the "ASEAN Member States").[1290]

In 1997, the ASEAN Member States in Kuala Lumpur committed to reaching the ASEAN Vision 2020 that led them to engage in closer cooperation known as the One ASEAN Community, as drafted at a conference in Bali in 2003. The ASEAN Community is based on so-called three pillars to attain and achieve the ASEAN Vision 2020.[1291] These three pillars are the ASEAN Economic Community (AEC), the ASEAN Security Community (ASC) and the ASEAN Socio-Cultural Community (ASCC). The latest works for implementing the ASEAN Community were described in the ASEAN Community Vision 2025 as concluded in Kuala Lumpur in 2015.[1292] The latest declaration contains more details on the ASEAN Community Vision 2025, comprising the ASEAN Political-Security Community Blueprint 2025, the ASEAN Economic Community Blueprint 2025 and the ASEAN Socio-Cultural Community Blueprint 2025.[1293]

The above cooperation of the ASEAN Member States and its vision as the ASEAN Community has consequently led to the meeting of various legal systems. The unification and or harmonization between such systems in preparing for the cooperation, is therefore essential. In light of this, this research addresses a particular field of law, namely marriage establishment under the family law. Besides being necessary to preparing for the ASEAN motto One Vision, One Identity, One Community, this field is also important because as one open community, it would be necessary for ASEAN to facilitate the possibility of marriages taking place between the nationals of the ASEAN Member States.

The commitment of marriage between two individuals who have two different nationalities or which involves two or even more legal systems results in a contact or

[1290] ASEAN is an intergovernmental organization which was established on August 8, 1967 in Bangkok based on the Bangkok Declaration by five founding member states namely Indonesia, Malaysia, Singapore, the Philippines and Thailand. After its establishment, Brunei Darussalam joined on January 8, 1984, followed by Vietnam on July 28, 1995, Lao PDR and Myanmar on July 23, 1997 and lastly Cambodia on April 30, 1999. At present, the above are known as the ten Member States of ASEAN. Official ASEAN webpage available at http://www.asean.org/asean/about-asean/overview..

[1291] See "Declaration of ASEAN Concord II (Bali Concord II) 2003", available at http://asean.org/?static_post=declaration-of-asean-concord-ii-bali-concord-ii-2.

[1292] See "ASEAN Vision 2025: Forgoing Ahead Together" at http://www.asean.org/storage/2015/12/ASEAN-2025-Forging-Ahead-Together-final.pdf.

[1293] *Ibid*.

connection between different legal systems. This contact or connection arises from a situation whereby the bride and the groom do not have the same nationality, or are not living in the same state, or do not have the nationality of the country in which they live. These situations make their marriage different from a domestic marriage.

The term domestic marriage, on the other hand, refers to a marriage between two people of the same nationality, with the place of marriage solemnization also being the country of their nationality. On a domestic marriage, one legal system is applied without any option to choose any other laws.

In a marriage that involves a contact between two or more legal systems, it is expected that such marriage is considered valid and legal according to each of such legal systems. A valid and legal marriage will result in legal protection for the couple and both the husband and wife alike. Another reason as to why this is important is to provide valid protection for the children born from such a marriage.

As a result of contact between differing legal systems in a marriage between spouses with different nationalities, Private International Law (hereinafter referred to as "**PIL**") is of considerable importance. First of all, PIL decides on which law is to be applied as the prevailing law to determine the capacities of husband and wife. Secondly, PIL determines which law is to be applied to solemnize the marriage or the authorized forum for the marriage, including the marriage registration whenever necessary or as may be required by the applicable laws. Thirdly, PIL deals with the issue of acknowledgment or recognition of a marriage. If a court is requested to dissolve a marriage which was entered into abroad, the first question will naturally regard the validity of the marriage. Such validity will depend on the recognition of such marriage.

PIL is the instrument needed to bridge existing differences in the substantive laws of the ASEAN Member States. PIL contributes to the coordination of the different legal systems and is an important step towards future harmonization and unification of the differing legal systems of the ASEAN Member States. Diversity of the various national laws requires a system of coordination between the ASEAN Member States which is compatible with the culture and tradition of ASEAN.

According to one of the prime principles of PIL all national legal systems in the world are equal. PIL therefore respects any existing diversities between the laws of ASEAN Member States and aims to solve any possible conflicts between them. This principle is also reflected in the cooperation principles amongst the ASEAN Member States from the initial establishment of ASEAN, i.e. that any state will not interfere with and will respect the authorities of other states.

The unification of ASEAN's family law will go beyond what the ASEAN Member States would be able to accomplish, as there are major differences between the

substantive law of the Member States. In addition, some opinions state that family law is unsuitable for international unification, as it is based on social and cultural norms and values which are excessively varied and sensitive. The deeply rooted nature of family law within each of the ASEAN Member State serves in itself a primary difficulty for ASEAN to harmonize or unify the same.

Despite growing support for cooperation amongst the ASEAN Member States, the harmonization and/or unification of family law is still not feasible since (i) differences in substantive family law cannot be denied, and (ii) there is no legal basis for such harmonization and/or unification. Such will therefore be a great challenge for ASEAN. However, efforts to undertake such attempt cannot be delayed, whereby one should start and try to make an approach.

Family law is an area that is regulated by the national laws of a country. This research therefore seeks to examine the nature of marriage within the national laws of the ASEAN Member States. Bearing in mind that this research serves as an early stage of the ASEAN framework, it will start with a comparison of marriage law. Since a comparison of all legal aspects of marriage would be too wide-ranging, the author focuses on the topic of marriage formation or marriage establishment only.

In order to obtain the essence of marriage between the national laws of the ASEAN Member States, a comparison of the national laws would relate to the establishment of marriage, particularly the substantive requirements and the solemnization of such marriage.

The aim of this comparison is to untangle and analyze the differences and similarities in the establishment of marriage as stipulated by the national laws of the ASEAN Member States. As far as differences are concerned, further analysis will touch upon whether such differences could be bridged by PIL. In relation to the similarities, the analysis will focus on the question whether those could serve as a basis for recognition or acknowledgment of a foreign ASEAN marriage. The ultimate aim would be the development of an intra-ASEAN system of international family law as well as the choice of methodology of law underlying the national systems of international family law in the ASEAN Member States.

In relation to Indonesia, the aim of this research is to ascertain what Indonesia can learn from other ASEAN Member States by comparing substantive requirements and solemnizations of marriage being made, particularly on their PIL rules and inter-personal rules of law (conflict of laws rules), if any. Such research is needed in order to facilitate the marriages of Indonesian nationals which are solemnized abroad and mixed marriages in Indonesia. The marriage regulations in Indonesia, namely the MA 1974 and the Academic Bill of Indonesian PIL, have become major highlights in this

regard. In particular the Bill of Indonesian PIL is of importance due to the current discussions relating to the bill in Indonesian literature.

This research consists of eight chapters that hereafter can be divided into three major parts. The first part consists of chapters 2 and 3, which contain an overview and discussion on Indonesian laws and regulations on marriage. The second part consists of chapters 4, 5 and 6. These chapters discuss ASEAN as the regional organization in Southeast Asia which consists of ten member states and the marriage law according to each of their respective national laws, including mixed marriage. The last part consists of chapters 7 and 8 as the concluding chapters of this research.

Chapter 2 explains on the Indonesian marriage law as provided in MA 1974, particularly on the substantial requirements of marriage and its solemnization. It will give a general overview on how Indonesia has regulated the issue of marriage and its legal consequences.

Chapter 3 describes mixed marriage based on MA 1974, which defines the same as a marriage between a husband and wife who are subject to differing national laws due to differences in their nationalities, one of whom is an Indonesian national. The discussion will cover the determination of the applicable law to decide on the capacity to marry of husband and wife and the valid solemnization of the marriage.

In addition, this chapter will also cover the inter-faith mixed marriage, which has recently become a trending topic since several law students have requested for constitutional adjudication on the same. This discussion will be followed by landmark decisions whenever necessary to confirm any ambiguity. Lastly, this chapter will also discuss the Bill of Indonesian PIL, with the choice of law and the authorized state forum becoming the main points of focus.

Chapter 4 discusses ASEAN as the regional organization in Southeast Asia which consists of ten member states. This chapter explains the purposes and objectives of ASEAN which are better known as the three pillars of cooperation of ASEAN. The chapter will also discuss the characteristics of ASEAN (including its atmosphere and decision-making system) or the so-called “ASEAN Way”. This discussion seeks to answer whether the ASEAN Way could indeed help the harmonization and unification of PIL within the ASEAN Member States.

Chapter 5 elaborates on marriage regulations, particularly substantive law requirements in relation to the capacity of the couple and valid solemnization of the marriage. The elaborations will be made in an alphabetical order of the member states: Brunei Darussalam, Cambodia, Lao PDR, Malaysia, Myanmar (previously: Burma), the Philippines, Singapore, Thailand and Vietnam. Each of their laws will be compared to

Indonesian law, particularly as regards the substantive requirements and the solemnization of a marriage.

Chapter 6 discusses the regulations of the ASEAN Member States in relation to a marriage that contains an international or foreign aspect to it. This chapter will discuss the marriage between a couple of differing nationalities one of whom is a native and the solemnization of marriage. This chapter will also cover a marriage which is held outside the territory of the relevant state. How prevailing laws and regulations determine the applicable law is the main focus of discussion on the aforesaid type of marriage. Inter-faith mixed marriage will also be discussed, namely when there is no regulation on a marriage between a husband and wife who are a national and a foreign national as well as its solemnization.

Chapter 7 constitutes the beginning of the concluding part. It will contain the conclusions of the aforementioned discussions. This chapter will also include recommendations of the basic thoughts and spirit in preparing rules and regulations (also on the recognition of marriages) for the ASEAN One Community. This chapter includes a discussion on the Bill of Indonesian PIL, which among others contains a proposal to amend the nationality principle as well as the PIL rules in relation to mixed marriages in Indonesia.[1294]

Chapter 8 consists of research conclusions on the subject matters in question as well as any necessary suggestions and/or recommendations for both the ASEAN framework and Indonesia. The suggestions of author are focusing on Academic Bill of Indonesia PIL. Firstly, Indonesia should provide regulations on mixed marriage in more details and should provide provisions on the recognition of marriages solemnized or held abroad. *Renvoi* in Indonesian PIL, public policy and mandatory rules are also the emergence topics to be regulated. In addition, the author concludes that Indonesia needs more flexibility in determining the applicable law based on the Principle of Nationality, by giving space to the Habitual Residence. It is also important that Indonesia should consider becoming a member of international organizations which discuss PIL-rules and to actively participate in international discussions on the development of PIL conventions. Secondly, in relation to the ASEAN One Community, in particular in respect of the marriage law, some recommendations can be offered to the ASEAN legislators. ASEAN needs to establish a common methodology for determining the applicable law. ASEAN should be transparent to work together in harmonization of PIL rules regarding marriage. A PIL system in ASEAN should display the following features: coherence, logical structure, absence of contradiction, completeness, clarity,

[1294] See Sudargo Gautama (1987), also see Sudargo Gautama and Sri Hanifa Wiknjosastro, *Some Aspects of Indonesian Private International Law,* Malaya Law Review, 1990, pp. 418-432.

and ease of use.[1295] The legal instruments of ASEAN should be clear and should provide legal certainty. Furthermore, the ASEAN Way as the decision-making rules need to be sharpened. ASEAN should elaborate its own culture to enrich its PIL and propose a model law, and ASEAN should maintain the principle of "*lex loci celebrationis*".

[1295] Fiorini, 2008

Samenvatting

De Associatie van Zuidoost-Aziatische Naties (Association of Southeast Asian Nations), beter bekend als "ASEAN", is een intergouvernementele regionale organisatie opgericht in 1967 bestaande uit tien lidstaten (hierna te noemen "ASEAN Lidstaten").[1296]

In 1997 hebben de ASEAN Lidstaten in Kuala Lumpur zich gecommitteerd aan de ASEAN Vision 2020 die hen ertoe heeft gebracht een nauwere samenwerking aan te gaan. Dit staat bekend als de One ASEAN Community. Op de in 2003 georganiseerde conferentie in Bali werden de drie pijlers geformuleerd waarop de ASEAN Community is gebaseerd en die ten doel hebben de ASEAN Vision 2020 te bereiken.[1297] Deze drie pijlers zijn: de ASEAN Economic Community (AEC), de ASEAN Security Community (ASC) en de ASEAN Socio-Cultural Community (ASCC). Het meest recente werk voor de uitvoering van de ASEAN Community staat beschreven in de ASEAN Community Vision 2025 (Kuala Lumpur, 2015).[1298] De laatste verklaring geeft meer details over de ASEAN Community Vision 2025 en omvat de volgende onderdelen: de ASEAN Political-Security Community Blueprint 2025, de ASEAN Economic Community Blueprint 2025 en de ASEAN Socio-Cultural Community Blueprint 2025.[1299]

De bovengenoemde samenwerking tussen de ASEAN Lidstaten heeft tot gevolg dat verschillende rechtstelsels met elkaar in contact komen. De unificatie en/of harmonisatie van dergelijke rechtstelsels is daarom essentieel in voorbereiding op samenwerking. In dit licht richt dit onderzoek zich op één bepaald rechtsgebied, namelijk het tot stand brengen van een huwelijk volgens het familierecht. Dit onderzoeksveld is belangrijk gezien het ASEAN-motto: Eén Visie, Eén Identiteit, Eén gemeenschap. Binnen één open gemeenschap zou het namelijk voor onderdanen van de ASEAN Lidstaten mogelijk moeten zijn om met elkaar te trouwen.

De verbintenis van het huwelijk tussen twee individuen met twee verschillende nationaliteiten of waarbij twee of meerdere rechtstelsels betrokken zijn, kan leiden tot

[1296] ASEAN is een intergouvernementele organisatie die op 8 augustus 1967 in Bangkok werd opgericht met de ondertekening van de Verklaring van Bangkok door de vijf initiatiefnemende landen: Indonesië, Maleisië, Singapore, de Filippijnen en Thailand. Na de oprichting is Brunei op 8 januari 1984 toegetreden, gevolgd door Vietnam op 28 juli 1995, Laos en Myanmar op 23 juli 1997, en tenslotte Cambodja op 30 april 1999. De bovengenoemde landen staan bekend als de tien Lidstaten van de ASEAN. De officiële ASEAN webpagina is te vinden op http://www.asean.org/asean/about-asean/overview.

[1297] Zie "Verklaring van ASEAN Verdrag II (Verdrag van Bali II) 2003", beschikbaar op http://asean.org/?static_post=declaration-of-asean-concord-ii-bali-concord-ii-2.

[1298] Zie "ASEAN Vision 2025: Forgoing Ahead Together" beschikbaar op http://www.asean.org/storage/2015/12/ASEAN-2025-Forging-Ahead-Together-final.pdf.

[1299] *Ibid*.

een conflict tussen de verschillende rechtstelsels. Deze situaties ontstaan wanneer de bruid en bruidegom niet dezelfde nationaliteit hebben, of niet in dezelfde staat leven, of niet de nationaliteit hebben van het land waarin zij wonen. Een dergelijk huwelijk is anders dan een binnenlands huwelijk.

De term binnenlands huwelijk verwijst naar een huwelijk tussen twee mensen van dezelfde nationaliteit en waarbij de huwelijksvoltrekking plaatsvindt in hetzelfde land als dat van hun nationaliteit. Op een binnenlands huwelijk wordt één rechtsstelsel toegepast zonder de mogelijkheid om een ander rechtsstelsel aan te wijzen.

Van een huwelijk waarbij sprake is van twee of meerdere rechtsstelsels die met elkaar in conflict zijn, wordt verwacht dat een dergelijk huwelijk als geldig en wettelijk wordt beschouwd volgens elk van de betrokken rechtsstelsels. Een geldig en wettelijk huwelijk resulteert in wettelijke bescherming voor het echtpaar, zowel voor de man als de vrouw. Een andere belangrijke reden is het bieden van wettelijke bescherming voor kinderen geboren uit zo'n huwelijk.

Internationaal privaatrecht (hierna "**IPR**") is van groot belang bij een huwelijk tussen twee verschillende nationaliteiten aangezien verschillende mogelijk conflicterende rechtstelsels samenkomen. Allereerst bepaalt het IPR welk recht toepasselijk is op de huwelijksbevoegdheid van zowel de man als de vrouw. Ten tweede beslist het IPR welk recht van toepassing is op de huwelijksvoltrekking en welk forum daartoe bevoegd is, inclusief de bevoegdheid voor de registratie van dat huwelijk. Ten derde regelt het IPR op de erkenning van het huwelijk. Wanneer aan de rechter verzocht wordt om een in het buitenland gesloten huwelijk te ontbinden rijst de allereerst de vraag of er sprake is van een geldig huwelijk. Het antwoord op die vraag hangt af van de vraag of het buitenlandse huwelijk wordt erkend.

Het IPR is als instrument nodig om de tussen de ASEAN Lidstaten bestaande verschillen in materieel recht te overbruggen. Regels van IPR zullen derhalve bijdragen aan de coördinatie van de verschillende rechtsstelsels in de ASEAN Lidstaten. Ook is het IPR een voorstation voor toekomstige harmonisatie en unificatie van het materiële recht in de lidstaten. De diversiteit van de verschillende nationale wetten vereist een coördinatiesysteem tussen de ASEAN Lidstaten dat verenigbaar is met de cultuur en traditie van de ASEAN.

Volgens het belangrijkste uitgangspunt van het IPR zijn alle nationale rechtsstelsels gelijkwaardig. Het IPR respecteert de bestaande verschillen tussen de rechtsstelsels van de ASEAN Lidstaten en streeft ernaar mogelijke conflicten tussen deze stelsels op te lossen. Dit principe komt eveneens tot uiting in de samenwerkingsbeginselen die al vanaf de oorspronkelijke oprichting van de ASEAN bestaan, namelijk dat elke staat de

autoriteiten van de andere staten zal respecteren en dat er geen inmenging zal plaatsvinden.

De unificatie van het familierecht in de ASEAN Lidstaten zal verder gaan dan waartoe de ASEAN Lidstaten in staat zijn, aangezien er aanmerkelijke verschillen bestaan tussen dit recht in deze lidstaten. Daarbij komt dat het familierecht volgens sommige schrijvers ongeschikt is om te unificeren, omdat het gebaseerd is op sociale en culturele normen en waarden die buitengewoon gevarieerd zijn en uiterst gevoelig liggen. Het diepgewortelde en verschillende karakter van het familierecht in elk van de ASEAN Lidstaten vormteen obstakel voor het bereiken van unificatie.

Ondanks de groeiende steun voor samenwerking tussen de ASEAN Lidstaten, is ook nu de harmonisatie en/of unificatie van het familierecht niet haalbaar, omdat (i) de bestaande verschillen in materieel familierecht gerespecteerd moeten worden, en (ii) er geen wettelijke basis bestaat voor een dergelijke harmonisatie en/of unificatie. Gezien de grootte van deze uitdaging mogen pogingen daartoe echter niet langer worden uitgesteld en zal men moeten beginnen met het zoeken van toenadering.

Het familierecht wordt gereguleerd door de nationale wetgeving van een land. Dit onderzoek tracht daarom de aard van het huwelijk te onderzoeken binnen de nationale wetten van de ASEAN Lidstaten. Rekening houdend met het feit dat dit onderzoek plaatsvindt in een nog vroege fase van ASEAN, zal er begonnen worden met het maken van een vergelijking van het huwelijksrecht. Aangezien een rechtsvergelijkend onderzoek naar alle aspecten van het huwelijk te omvangrijk zou zijn, beperkt het onderzoek zich tot de totstandkoming van het huwelijk.

Om in de nationale wetten van de ASEAN Lidstaten de essentie van het huwelijk te vangen, zal de vergelijking van de nationale wetten zich richten op het aangaan van een huwelijk, met bijzondere aandacht voor de materiële vereisten en de voltrekking van dat huwelijk.

Het doel van deze vergelijking is het ontwarren en analyseren van de verschillen en overeenkomsten in de nationale wetgeving van de ASEAN Lidstaten die betrekking hebben op de totstandkoming van het huwelijk. Wat de verschillen betreft, zal de verdere analyse zich richten op de vraag of de verschillen door middel van IPR-regels kunnen worden overbrugd. Met betrekking tot de overeenkomsten zal de analyse zich richten op de vraag of deze zouden kunnen dienen als basis voor erkenning van een in een ander ASEAN land gesloten huwelijk. Het uiteindelijke doel zal dan zijn te bepalen in welke vorm en omvang een supranationaal ASEAN systeem van internationaal familierecht tot stand kan worden gebracht, alsmede om te bepalen welke methodologie ten grondslag kan worden gelegd aan de nationale familierechtelijke IPR-regels van de lidstaten van ASEAN.

Wat Indonesië betreft, is het doel van dit onderzoek om vast te stellen wat Indonesië van andere ASEAN Lidstaten kan leren door een vergelijking te maken van de materiële huwelijksvereisten en huwelijksplechtigheden. De aandacht zal zich vooral richten op de IPR-regels en, indien van toepassing, het interpersoonlijk recht van de ASEAN Lidstaten.

Voornoemd onderzoek is nodig om het voor Indonesische onderdanen makkelijker te maken om te trouwen in het buitenland en om gemengde huwelijken aan te gaan in Indonesië. De huwelijksregelingen in Indonesië, MA 1974 en het Academische Wetvoorstel voor Indonesisch Internationaal Privaatrecht (Academic Bill of Indonesian PIL), hebben veel aandacht gekregen. Met name het Academische Wetsvoorstel is momenteel onderwerp van debat.

Het onderzoek in dit boek beslaat acht hoofdstukken die kunnen worden onderverdeeld in drie grotere eenheden. Deel één, bestaande uit de hoofdstukken 2 en 3, geven een overzicht en bediscussiëren de Indonesische wet- en regelgeving met betrekking tot het huwelijk. Het tweede deel, gevormd door hoofdstukken 4, 5 en 6, gaat in op ASEAN als de regionale organisatie in Zuidoost-Azië en het huwelijksrecht volgens de nationale wetten van de tien lidstaten, waarbij ook ingegaan wordt op gemengde huwelijken. Het laatste deel bestaat uit de hoofdstukken 7 en 8 en bevat de conclusies van dit onderzoek.

Hoofdstuk 2 geeft uitleg over het Indonesische huwelijk zoals voorzien in de wet MA 1974, in het bijzonder over de materiële vereisten van het huwelijk en de voltrekking van het huwelijk. Een algemeen overzicht wordt gegeven van de manier waarop Indonesië het huwelijk regelt en de juridische consequenties daarvan.

Hoofdstuk 3 beschrijft een gemengd huwelijk op basis van MA 1974, dat wil zeggen een huwelijk tussen een man en vrouw, onderworpen aan verschillende nationale wetten vanwege verschillen in hun nationaliteit, maar waarvan één een Indonesisch staatsburger is. De discussie heeft betrekking op de bepaling van de toepasselijke wet die moet beslissen over de huwelijksbevoegdheid van elk van de echtgenoten en over de geldigheid van de huwelijkssluiting.

Daarnaast zal gaat dit hoofdstuk in op interreligieus gemengde huwelijken, die recentelijk een trending topic zijn geworden nu recentelijk door rechtenstudenten een verzoek is gedaan tot een constitutionele uitspraak over dit onderwerp. Deze discussie wordt aangevuld met belangrijke rechterlijke uitspraken om enige dubbelzinnigheid van de wet, zo deze bestaat, aan te tonen. Ten slotte gaat dit hoofdstuk ook in op het Academische Wetvoorstel voor Indonesisch Internationaal Privaatrecht bespreken, met speciale aandacht voor het toepasselijke recht en de vraag welk forum van een land bevoegd is.

Hoofdstuk 4 gaat nader in op ASEAN als de regionale organisatie in Zuidoost-Azië bestaande uit tien lidstaten. In dit hoofdstuk worden de doelstellingen van ASEAN uitgelegd, die beter bekend staan als de drie pijlers van samenwerking. Het hoofdstuk behandelt ook de kenmerkende eigenschappen van ASEAN, de zogenaamde "ASEAN Way", waarbij ingegaan wordt op de sfeer en het besluitvormingssysteem. Een antwoord wordt gezocht op de vraag of de ASEAN Way daadwerkelijk zou kunnen bijdragen aan de harmonisatie en unificatie van het IPR binnen de ASEAN Lidstaten.

Hoofdstuk 5 bespreekt de huwelijksvoorschriften, met name die betreffende de materiële huwelijksvereisten met betrekking tot de huwelijksbevoegdheid van het paar, en de rechtsgeldige voltrekking van het huwelijk. De uitwerkingen worden gerangschikt in alfabetische volgorde van de lidstaten: Brunei Darussalam, Cambodja, Laos, Maleisië, Myanmar (voorheen: Birma), de Filippijnen, Singapore, Thailand en Vietnam. De wetgeving van elk van deze landen zal worden vergeleken met de Indonesische wetgeving, in het bijzonder met betrekking tot de materiële vereisten en de huwelijksvoltrekking.

Hoofdstuk 6 bevat een bespreking van de regelgeving van de ASEAN Lidstaten betreffende een huwelijk met een internationaal of buitenlands element. Ingegaan wordt op een huwelijk tussen twee personen met een verschillende nationaliteit van wie er één inheems is. Dit hoofdstuk behandelt ook de situatie waarin het huwelijk plaatsvindt buiten de landsgrenzen van de betreffende staat. Het belangrijkste onderwerp van onderzoek is hoe de heersende wet- en regelgeving in de hierboven genoemde situaties het toepasselijke recht aanwijzen. Het interreligieuze huwelijk zal ook worden besproken voor de situatie waarin een staatsburger en een buitenlands staatsburger betrokken is en waarvoor geen regeling bestaat voor de voltrekking van het huwelijk.

Hoofdstuk 7 vormt het begin van het slotgedeelte. Het bevat de conclusies van de bovengenoemde discussies. Dit hoofdstuk doet ook aanbevelingen over de basisprincipes en de geest van de wenselijke aanpak voor de ASEAN One Community omtrent het opstellen van regels en regelgeving, inclusief die voor de erkenning van het huwelijk. Daarnaast wordt het Academische Wetvoorstel voor Indonesisch Internationaal Privaatrecht besproken waarbij voorstellen worden gedaan voor wijzigingen van zowel het nationaliteitsprincipe als van de IPR-regels die betrekking hebben op gemengde huwelijken binnen Indonesië.[1300]

De onderzoeksconclusies staan beschreven in hoofdstuk 8. Tevens worden er suggesties en/of aanbevelingen gedaan voor zowel ASEAN als voor Indonesië. De suggesties van de auteur richten zich op het Academische Wetvoorstel voor Indonesisch Internationaal

[1300] Zie Sudargo Gautama (1987); Zie Sudargo Gautama en Sri Hanifa Wiknjosastro, *Some Aspects of Indonesian Private International Law,* Malaya Law Review, 1990, pp. 418-432.

Privaatrecht . Ten eerste zou Indonesië meer gedetailleerde regelgeving moeten opstellen met betrekking tot het gemengde huwelijk en voorzieningen moeten treffen om huwelijken te erkennen die in het buitenland plaatsvinden. Opkomende onderwerpen, zoals *Renvoi* in het Indonesische IPR, het leerstuk van de openbare orde en de voorrangsregels dienen nodig te worden gereguleerd. Daarnaast concludeert de auteur dat Indonesië flexibeler zou moeten omgaan met de nationaliteitsaanknoping door ook rekening te houden met de gewone verblijfplaats. Daarnaast is ook belangrijk om onderdeel uit te maken van organisaties die IPR-verdragen tot stand brengen en in dat kader deel te nemen aan de discussie over wenselijke IPR-regels.. Ten tweede, met betrekking tot de ASEAN One Community, in het bijzonder het huwelijksrecht, zijn er enkele aanbevelingen te doen aan de wetgevers van ASEAN. Zo zou ASEAN de een gemeenschappelijke methode moeten kiezen voor het bepalen van het toepasselijke recht. Ook zou ASEAN duidelijk moeten zijn over het tot stand brengen van uniforme IPR-regels inzake huwelijk. Daarnaast zou het stelsel van IPR-regels in ASEAN de volgende kenmerken moeten bezitten: samenhang, logische structuur, afwezigheid van tegenstrijdigheden, volledigheid, duidelijkheid en gebruiksvriendelijkheid.[1301] De juridische IPR-instrumenten van ASEAN moeten helder zijn en rechtszekerheid bieden. Daarnaast dient de ASEAN Way, als besluitvormingssysteem, te worden aangescherpt. ASEAN zou dieper in haar eigen cultuur moeten graven om het ASEAN internationaal privaatrecht te verrijken en te komen tot voorstellen ASEAN IPR-modelwetten. ASEAN zou daarbij de "*lex loci celebrationis-regel*" moeten handhaven.

[1301] Fiorini, 2008